CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 212

SOUTHERN PACIFIC COMPANY, APPELLANT,

vs.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, WILLIAM G. BONELLI AND HARRY B. RILEY, AS MEMBERS OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

FILED JULY 19, 1938.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 212

SOUTHERN PACIFIC COMPANY, APPELLANT,

vs.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, WILLIAM G. BONELLI AND HARRY B. RILEY, AS MEMBERS OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

INDEX.

	Original	Print
Record from D. C. U. S., Northern District of California	1	1
Bill of complaint	1	1
Exhibit "A"—Statement showing track material purchased during 3 months ended June 30, 1936	37	31
Exhibit "B"—Statement showing materials and supplies, etc. (other than track material), purchased during 3 months ended June 30, 1936	38	32
Exhibit "C"—California Use Tax Act of 1935 (omitted in printing)	51	
Stipulation re construction of complaint (omitted in printing)	52	
Motion for temporary restraining order, etc.	54	40
Order noticing necessity for other judges, issuing temporary restraining order and order to show cause	56	41

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 4, 1938.

—8306

	Original	Print
Record from D. C. U. S., Northern District of California—Continued		
Proof of service of copy of complaint, temporary restraining order and order to show cause on Governor of State of California	60	43
Motion to dismiss bill of complaint	62	44
Opinion, Denman, J., on motion to dismiss	65	46
Decree for interlocutory injunction	88	63
Answer to bill of complaint	91	65
Stipulation of facts	99	71
Stipulation for correction of stipulation of facts (omitted in printing)	128	
Opinion, Denman, J.	130	94
Findings of fact and conclusions of law proposed by defendants (adopted by court)	139	100
Objections to conclusions of law proposed by defendants, and conclusions of law proposed by plaintiff	176	128
Final decree	181	131
Petition for appeal, assignment of errors and prayer for reversal	183	132
Order allowing appeal	230	136
Bond on appeal (omitted in printing)	232	
Stipulation as to transcript of record	238	137
Clerk's certificate (omitted in printing)	241	
Citation and service (omitted in printing)	242	
Statement of points to be relied upon and designation as to printing record	244	139

[fol. 1]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Equity No. 4055-R

SOUTHERN PACIFIC COMPANY (a Corporation), Plaintiff,

vs.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. GOLLINS, Ray L. Edgar, and Ray L. Riley, as Members of the State Board of Equalization of the State of California; State Board of Equalization of the State of California, and U. S. Webb, the Attorney General of the State of California, Defendants

Action to Enjoin Collection of Taxes Under California Use Tax Act of 1935

BILL OF COMPLAINT—Filed July 10, 1936

[fol. 2] To the Honorable the District Court of the United States, in and for the Northern District of California, Southern Division:

Southern Pacific Company, a corporation, presents this, its verified bill of complaint, against the defendants above named and designated and for cause of action complains and alleges as follows:

I

Status of the Parties

(a) Plaintiff is, and at all times hereinafter mentioned, has been, a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky, and a citizen and a resident of said State of Kentucky. Plaintiff now is, and at all times herein mentioned has been, engaged in the operation, as a common carrier in interstate commerce, of lines of railroad, situated in the States of Oregon, California, Nevada, Utah, Arizona, Texas and New Mexico, and in the transportation of passengers and property from, to and between points in each and all of said states, and

at all times herein mentioned plaintiff, as such interstate common carrier by railroad, has been and now is subject to the provisions of the Act of Congress, approved February 4, 1887, and acts amendatory thereof and supplementary thereto, known as the Interstate Commerce Act.

(b) The defendant, John C. Corbett, is a citizen and resident of the State of California residing in San Francisco in said state; the defendant Fred E. Stewart, is a citizen and resident of the State of California, residing in the City of Oakland in said state; the defendant Richard E. Collins, is a citizen and resident of the State of California, residing in the City of Redding in said state; the defendant Ray L. Edgar, is a citizen and resident of the State of California, residing in the City of San Diego in said state; and the defendant Ray L. Riley, is a citizen and resident of the State of California, residing in the City of [fol. 3] Sacramento in said state and said persons constitute the State Board of Equalization of the State of California.

(c) At all times hereinafter mentioned the defendant, State Board of Equalization of the State of California, was and now is, an official board, organized and existing under and by virtue of the constitution and laws of the State of California, consisting of the persons named and described in the foregoing paragraph, with the Controller of the State, Ray L. Riley, acting as an ex-officio member thereof.

(d) The defendant, U. S. Webb, is a citizen and resident of the State of California, residing in the City of San Francisco, and is the duly elected, qualified and acting Attorney General of the State of California.

II

Jurisdiction

The grounds upon which the jurisdiction of this court depends are as follows:

(a) This suit is one of a civil nature, in equity, between citizens of different states.

(b) The matter in controversy greatly exceeds, exclusive of interest and costs, the sum or value of $3,000.00 to wit, an alleged indebtedness for taxation claimed to be due to the State of California and payable to the said State Board

of Equalization in a sum of money amounting to Forty Seven Thousand, Seven Hundred Five and 72/100 Dollars, and also sums of money which will continue to accrue in the future under the provisions of the taxing act complained of in this action and the claims of the defendants thereunder.

(c) This suit arises under the Constitution and laws of the United States in that plaintiff seeks herein, pursuant to Sub-section 14 of Section 41, Title 28 of the U. S. Code, to [fol. 4] restrain and enjoin the enforcement of that certain statute of the State of California, hereinafter described, known as the Use Tax Act of 1935, Chapter 361, Statutes of 1935 of the State of California, to the extent that the taxes provided for in and by said Act are imposed on certain materials purchased in interstate and foreign transactions from sellers located outside of the State of California, and shipped in interstate and foreign transportation to the plaintiff at places within the State of California, for the purpose of use and thereafter used in conducting interstate railway transportation, which tax, so imposed under said Act, according to the particulars hereinafter related, constitutes a tax upon the use of such materials in carrying on interstate transportation and constitutes a tax and burden upon the privilege of using such materials in conducting interstate transportation and is a burden on interstate and foreign commerce contrary to and in violation of the provisions of Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2 of the Constitution of the United States, and that the imposition and collection of said tax effectuates a taking of plaintiff's property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

(d) The damages and injury which plaintiff would sustain by reason of said statute if the enforcement thereof in the particulars herein complained of be not restrained are and would be great and irreparable, and the enforcement of collection of the taxes involved herein and claimed to be due from the plaintiff, and which would become due according to the terms of said statute, and the interpretations thereof by the defendants, and the claims for taxes asserted by said defendants against the plaintiff, would continue to run to large amounts and impose upon the plaintiff much accounting work and expense in connection with

[fol. 5] making returns and payments of said taxes; and by reason of penalty provisions of the said taxing act plaintiff cannot safely disregard the same and await suits for the collection of said taxes for the purpose of testing the validity thereof because large amounts of penalties would accrue and continue to accrue if such course were followed; and the purported remedy prescribed by said taxing act of payment of taxes under protest and suit to recover the same, being the only remedy allowed to the plaintiff under the terms of said act, would not and does not provide a prompt, speedy and adequate remedy at law because the purported remedy prescribed and directed in said statute is not a plain and certain remedy, is not a prompt and complete remedy, would not result in compensating plaintiff in full for all of the damages, losses and expenses which would be suffered by it, and would result in a multiplicity of actions in manner and form more particularly hereinafter related.

(e) In addition to the foregoing general statement as to the grounds upon which the jurisdiction of this court depends, the facts, circumstances and conditions hereinafter set forth in this bill of complaint, justify and necessitate the exercise of equity jurisdiction of this court, and the granting to the plaintiff of the relief herein sought, including relief by temporary restraining order, interlocutory and final injunction.

III

Description of Plaintiff's Lines of Railroad and Operations

Plaintiff's main lines of railroad extend from San Francisco, California, to Portland, Oregon; from San Francisco, California, to Ogden, Utah, and also from San Francisco, southeast to Los Angeles, California, and thence via Yuma and Tucson, Arizona, to El Paso, Texas, and thence [fol. 6] to Tucumcari, New Mexico. At each of said points as well as at numerous other points, plaintiff's lines connect with the lines of other interstate carriers and thus enter into and become a part of through routes of transportation of freight and passengers between all points of the United States, and to and from adjacent foreign countries. In addition to said main lines the plaintiff's transportation system consists of numerous branch lines extending therefrom. The miles of road operated at the close of the year 1935, as

reported to the Interstate Commerce Commission in Southern Pacific Company Annual Report, Table 412, was: total mileage (single track) Pacific Lines, 8783.45 miles, and for the State of California, 4,361.88 miles. The gross operating revenue of the Southern Pacific Company (Pacific Lines) for the year ended December 31, 1935, was $124,040,113.00, and that part thereof applicable to the State of California was $63,508,423.00. The said figures are the last available for a full year of operation. The gross operating revenue for the current year will probably exceed such amounts. The gross operating revenue aforesaid applicable to the State of California which was applicable respectively to interstate and intrastate operations, so far as the same could be allocated, and as reported by the plaintiff to the Railroad Commission of the State of California, was as follows: intrastate commerce, $26,926,287.00; interstate commerce, $34,988,335.00.

In the necessary operation, maintenance and repair of its railroad, plaintiff has and will purchase large amounts of materials, supplies, shop machinery, tools and equipment, printed matter and publications, a substantial part of which it buys in states other than California or in foreign countries and transports in interstate or foreign commerce into the State of California for its uses and purposes in conducting the operation, maintenance and repair of its said railroad. The seat of general management in the operation of said railroad is located at the City of San Francisco in [fol. 7] California, and large quantities of materials and supplies and the aforesaid items of property are purchased for use in the conduct of its business as a carrier within the State of California and elsewhere. Some of the materials and supplies and other articles of tangible personal property aforesaid are used in connection with certain overhead operations carried on and performed within the State of California for the benefit, and in connection with, the operations of the entire interstate railroad system so operated by the plaintiff because of the fact that general offices for the entire system are located within the State of California and certain general repair and maintenance shops and purchasing agents and stores for the purchase and distribution of supplies are located and operated for the use of said entire railway system at places within the State of California.

During the months of April, May and June, 1936, plaintiff purchased substantial quantities of tangible personal

property, and transported the same in interstate or foreign commerce into the State of California to various points on its said railroad for uses in the maintenance, repair and renewal of its railroad tracks and for the purposes of the operation of its railroad, consisting of steel rails, frogs, switches and track fastenings, purchased in states other than California; that said track materials were purchased for the sole, fixed and predetermined purpose of furthering and carrying into effect an existing maintenance program for the year 1936, requiring the replacement of existing rail, frogs, switches and track fastenings in said tracks, with such new rail, frogs, switches and track fastenings, and the said materials were or are in process of being transported in interstate commerce to the places of use, and thereafter in the regular course of business, were or will be placed in said railroad tracks, a highway of interstate commerce, to replace rail, frogs, switches and track fastenings removed [fol. 8] from said tracks. A list of said steel rail, frogs, switches and track fastenings so purchased, showing the purchase price, point of origin, and use for which purchased, is contained in the statement hereto attached, marked Exhibit "A" and by this reference made a part hereof. The total purchase price of said steel rail, frogs, switches and track fastenings upon which the tax hereinafter referred to and complained of is based, is the sum of $707,973.26 and the amount of tax claimed by said defendants to be due on account thereof under the terms of the said Use Tax Act of 1935 of the State of California, hereinafter described, is the sum of $21,239.20.

Also, during the months of April, May and June, 1936, plaintiff purchased in various states and in foreign countries, quantities of other materials and supplies, and other tangible personal property, for the purpose of use in the operation, maintenance and repair of its tracks, structures and equipment, and for the operation of its railroad, which were transported in interstate or foreign commerce, into the State of California to various points of use on its said railroad, consisting of lumber from Oregon for the repair of freight cars; sheet steel from Pennsylvania and Maryland for locomotive repairs, steel tires from Pennsylvania for locomotive repairs; steel tubing from Pennsylvania for locomotive repairs; car heating parts from Illinois and New York for passenger car repairs; glass from Pennsylvania for passenger car repairs; rolled steel wheels from Penn-

sylvania for passenger car repairs; pile driver parts from Wisconsin and Michigan for work equipment repairs; grease from Indiana for lubrication; cotton waste from New York, Wisconsin and Minnesota for lubrication; valve oil from Texas for lubrication; and large quantities of other items of tangible personal property for uses in the repair and maintenance of structures and equipment used in con- [fol. 9] ducting transportation, and materials, supplies, tools and equipment, printed matter and publications and miscellaneous items, used in the operation of said railway, a list of which items of tangible personal property showing the description thereof, purchase price, point of origin and use for which purchased, is shown in the statement attached hereto, marked Exhibit "B" and by this reference made a part hereof. The total purchase price of said materials upon which the tax hereinafter referred to and complained of is based, is the sum of $882,217.36, and the amount of tax claimed by defendants to be due thereon under the terms of the said Use Tax Act of 1935, is the sum of $26,466.52.

The plaintiff will, in the future, continue to purchase like materials for its purposes in conducting interstate transportation and in addition to the items specified on said Exhibits "A" and "B" the plaintiff will in the future purchase for like uses many other items and kinds of materials.

The estimated amount of taxes which will accrue during each succeeding quarterly taxing period as provided by said Act on account of tangible personal property purchased in interstate or foreign commerce by the plaintiff and which will be transported into the State of California, for use in the operation, maintenance and repair of its said railroad, according to the terms of said Use Tax Act of 1935, and the rulings and regulations made by said defendants, unless the collection of said tax is restrained by injunction, will amount to the sum of approximately $25,000.00.

Plaintiff says that because of the large mileage of the railroads so operated by it, it is necessary, in the interest of economy, enjoined upon said railroad by the Interstate Commerce Act and the legislative policy of Congress, to purchase much of its supplies in large quantities in anticipation of current and recurring needs, and to effect deliveries thereof to the extent reasonably possible in carload [fol. 10] lots, to its various points of distribution and uses,

to effect all possible economies in purchase, transportation and distribution, and that it is necessary to have supplies to meet current requirements distributed over its entire line of railroad in quantities and at the times necessary to anticipate regular current requirements, as well as the various emergency requirements, and to have such reserves in quantities necessary to meet constantly fluctuating demands and emergencies which result from changes in volume of transportation and the repairs which, from time to time, unavoidably arise from the destruction of property by reason of wrecks, derailments, fires, storms and other weather conditions and unavoidable casualties which arise in connection with conducting railroad transportation, and that materials so distributed and held for such uses and the process of distribution thereof is inseparably and essentially a part of the conduct of transportation by railway; and that the greater portion of said articles were and are specially designed for use in the operation, maintenance and repair of said railroad, or peculiarly adapted to railroad uses as aforesaid and are not suitable for any other use.

Said purchases were made by the plaintiff through the use of its operating capital consisting of money to current assets definitely devoted to the service of transportation, or through the credit of said plaintiff as a railroad engaged in the service of transportation and upon the purchase of said materials and the payment therefor, the expenses therefor are in due course charged into the operating expenses of said carrier to the appropriate accounts for operation, maintenance or repairs, according to the accounting rules and regulations prescribed for railroads engaged in interstate commerce under the provisions and requirements of the Interstate Commerce Act, and that all of said items of [fol. 11] tangible personal property so purchased by the plaintiff were devoted to the service of transportation immediately upon their purchase and that upon the purchase of said articles they immediately became a necessary and indispensable part of working capital, material, supplies, equipment and instrumentalities for the operation of said railroad and the said articles and each and all of them became, were and are instrumentalities used indiscriminately and inseparably in the operation, maintenance and repair of plaintiff's railroad for conducting interstate transportation and intrastate transportation from the time the same were purchased therefor, and any storage, use or con-

sumption thereof, which occurred within the State of California cannot be separated or segregated as between intrastate and interstate transportation, the said railroad contemporaneously carrying by means of the same organization and facilities, both intrastate and interstate commerce and said items and materials being from the time of purchase outside the State of California inextricably devoted to and used in service of both classes of commerce.

Plaintiff further says that said articles of tangible personal property sustained no storage of any character which intervened between the ending of the interstate transportation thereof which followed the purchase of said items of property, and the time when the same and each item thereof, was allocated and dedicated to uses in the conduct of transportation by plaintiff's railroad but, on the contrary, the said materials and each item thereof, were purchased by said plaintiff outside of the State of California for the sole and exclusive use and conduct of its business as an interstate carrier and that at all times from the purchase of said materials until use of said materials and each item thereof by said plaintiff said materials were devoted, dedicated and inseparably set apart exclusively for use in interstate com-
[fol. 12] merce; that prior to any keeping or retention of said materials within the State of California, said materials were allocated and dedicated to sole and exclusive use in interstate commerce and any keeping or retention thereof within the State of California was and is an inseparable part of the use of said materials and each item thereof in interstate commerce.

IV

Pertinent Portions of the Act

The taxing act under which the tax complained of herein is claimed to arise, is an act of the State of California entitled:

"An act imposing an excise tax on the storage, use or other consumption in this State of tangible personal property, providing for the registration of retailers, providing for the levying, assessing, collecting, paying and disposing of such tax, making an appropriation for the administration hereof, prescribing penalties for violations of the provisions hereof and providing that this act shall take effect immediately."

Said act, Chapter 361 Statutes of 1935, was approved by the Governor of the State of California, June 20, 1935, and since said date has been and now is in full force and effect.

For convenience of the Court, a full, true and correct copy of said act is attached hereto and marked Exhibit "C".

Section 3 of said act provides:

"Sec. 3. An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State at the rate of three per cent of the sales price of such property. Every person storing, using or otherwise consuming in this State tangible personal property purchased from a retailer shall be liable for the tax imposed by this act, and the liability shall not be extinguished until the tax has been paid to this State; provided, however, that a receipt from a retailer maintaining a place of business in this State, given to the purchaser in accordance with the provisions of section 6 hereof, shall be sufficient to relieve the purchaser from further liability for the tax to which such receipt may refer; provided further, that the board may by rule and regulation provide that a receipt from a retailer who does [fol. 13] not maintain a place of business in this State shall also be sufficient to relieve the purchaser from further liability for the tax to which such receipt may refer."

By Section 2(a) "storage" is defined to mean and include any keeping or retention in this state for any purpose except sale in the regular course of business, of tangible personal property, purchased from a retailer; by Section 2(b) the term "use" is defined to mean and include the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business; by Section 2 (c) the term "purchase" is defined to mean any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatever, of tangible personal property, for a consideration; by Section 2(h) "tangible personal property" as used in said Act, is defined as personal property which may be seen, weighed, measured, felt, touched or is in any other manner, perceptible to the senses; by Section 2(i) the term "business" as used in said act, is defined to include any activity, engaged

in by any person, including a corporation, or caused to be engaged in by him or it with the object of gain, benefit or advantage; either direct or indirect; and by Section 2 (g) the term "Board" as used in said Act means the State Board of Equalization of the State of California.

Section 4 of said Act, so far as material to the questions herein presented, contains the following provisions to wit:

"Sec. 4. The storage, use or other consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this act:

(a) Property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed by Chapter 1020, Statutes of 1933 and any amendments made or which may be made thereto.

(b) Property, the storage, use or other consumption of which this State is prohibited from taxing under the Con- [fol. 14] stitution or laws of the United States of America or under the Constitution of this State."

The tax imposed by Chapter 1020, Statutes of 1933, of the State of California, referred to in Paragraph (a) of Section 4 of said Act, commonly known as the California Retail Sales Tax Act, is an act imposing a tax for the privilege of selling, renting or leasing tangible personal property within the State of California and the effect of the exemption provision contained in said paragraph (a) of said Section 4 is to make the said use tax applicable only to tangible personal property purchased in interstate transactions from retailers or sellers outside of the State of California.

Other provisions of the said Use Tax Act require that every retailer, selling tangible personal property for storage, use or other consumption in this state, shall register with the Board and give the name and address of all agents operating in this state, the location of any and all distribution or sales houses or offices, or other places of business in this state, and such other information as the Board shall require (sec. 5); and that every retailer, maintaining a place of business in this state and making sales of tangible personal property for storage, use or other consumption in this state, not exempted under the provisions of Section 4 of said act, shall, at the time of making such sales, collect the tax imposed by this act from the purchaser (Sec. 6); and

it is further provided that the tax imposed by said act shall be due and payable quarterly to the State Board of Equalization on or before the 15th day of the month next succeeding each quarterly period, the first quarterly period provided for in said Act, commencing with the first day of July, 1935 (Sec. 7). The second quarterly period of the current year ended June 30, 1936; and, according to the terms of said act, tax payments falling due under said Act [fol. 15] for said period will be due and payable July 15, 1936. Every retailer, maintaining a place of business in this state, is required by said Act (Sec. 7) to file with said Board on or before the 15th day of the month following the close of each quarterly period, a return for the preceding quarterly period in the form prescribed by the Board, showing the total sales price of the tangible personal property sold by the retailer during the preceding quarterly period, the storage, use or consumption of which is subject to the tax imposed by said Act and said retailer or seller is required to accompany said return by a remittance, payable to the State Board of Equalization, of the amount of tax therein required to be collected by the retailer during the period covered by such return, and every person storing, using or consuming tangible personal property, purchased from a retailer who does not maintain a place of business in the State of California or is not an authorized tax collector, is required, on or before the 15th day of the month following the close of each quarterly period, to file with the Board a return for the preceding quarterly period in the form prescribed by said Board, showing the total sales price of the tangible personal property purchased by him or it during such preceding quarterly period, the storage, use or consumption of which is subject to the tax imposed by said Act, and such other information as the Board may deem necessary for the proper administration of said Act, and it is required that such return shall be accompanied by a remittance of the amount of tax imposed by said Act during the period covered by such return. The Act further provides that, for the purpose of the proper administration thereof, and to prevent evasion of the tax and the duty to collect the same thereby imposed, it shall be presumed that tangible personal property sold by any person for delivery in this state, is sold for storage, use or other consumption in this state, unless the person selling such property shall have [fol. 16] taken from the purchaser a certificate signed by

and bearing the name and address of the purchaser to the effect that the property was purchased for resale. The said Act (Sec. 8) further provides for the imposition of a penalty of 10% plus interest at the rate of one-half of one per cent per month, or fraction thereof, from the date on which the tax or the amount of the tax required by said Act to be collected and paid, became due and payable to the state, for the failure to pay any such tax to the state or for failure to make the return of said tax as required by said Act, and further provides (Sec. 18) that if the neglect or refusal to file a return as required by said Act and to pay said tax was due to fraud or an intent to evade said Act, or rules and regulations thereunder, a penalty of 25% of the amount required to be paid by any person or corporation liable for such tax shall be added, plus interest, as therein provided. It is provided that all amounts determined by the said Board to be due on account of the failure or refusal of the person liable therefor, to return, and pay the same, shall become due and payable at the time of service of notice and provided that all taxes or amounts required by said Act to be collected and paid to the Board on the date when the same became due and payable, shall bear interest at the rate of one-half of one per cent per month, or fraction thereof, from and after the date when the same became due and payable until paid.

The said Use Tax Act contains the following provisions with reference to the enforcement thereof, to wit:

Collection Procedure; Lien of Tax

"Sect. 20. In any case in which any amount required to be paid to the State in accordance with the provisions of this act, is not paid when due the board may file in the office of the county clerk of Sacramento County, or any other county, a certificate specifying the amount required to be paid, interest and penalty due, the name and last known address of the retailer or other person liable for the same, that the board has complied with all the provisions of this act in [fol. 17] relation to the determination of the amount herein required to be paid and a request that judgment be entered against the retailer or other person in the amount herein required to be paid, together with interest and penalty as set forth in the certificate. The county clerk immediately upon the filing of such certificate shall enter a judgment for the people of the State of California against the retailer or

other person in the amount herein required to be paid, together with interest and penalty as set forth in this certificate. The judgment may be filed by the county clerk in a loose-leaf book entitled, 'Special Judgments for State Retail Sales or Use Tax.'" * * *

"If any retailer liable for an amount of tax herein required to be collected shall sell out his business or stock of goods or shall quit the business, he shall make a final return and payment within fifteen days after the date of selling or quitting business. His successor, successors or assigns, if any, shall be required to withhold sufficient of the purchase money to cover the amount of such taxes herein required to be collected and interest or penalties due and unpaid until such time as the former owner shall produce a receipt from the board showing that they have been paid, or a certificate stating that no amount is due. If the purchaser of a business or stock of goods shall fail to withhold purchase money as above provided, he shall be personally liable for the payment of the amount of taxes herein required to be collected by the former owner, interest and penalties accrued and unpaid by any former owner, owners or assignors.

"In the event that any person is delinquent in the payment of the amount herein required to be paid by him, the board may give notice of the amount of such delinquency by registered mail to all persons having in their possession, or under their control, any credits or other personal property belonging to such person, or owing any debts to such person at the time of the receipt by them of such notice and thereafter any person so notified shall neither transfer nor make any other disposition of such credits, other personal property, or debts until the board shall have consented to a transfer or disposition, or until twenty days shall have elapsed from and after the receipt of such notice. All persons so notified must, within five days after receipt of such notice advise the board of any and all such credits, other personal property or debts, in their possession, under their control or owing by them, as the case may be.

"At any time within three years after any person is delinquent in the payment of any amount herein required to be paid, the board may proceed forthwith to collect such amount in the following manner: The board shall seize any property, real or personal, of such person and thereafter

sell at public auction such property so seized, or a sufficient portion thereof, to pay the amount due hereunder, together with any interest or penalties imposed hereby for such delinquency, and any and all costs that may have been incurred on account of such seizure and sale. Notice of such intended sale and the time and place thereof, shall be given to such delinquent person in writing at least ten days before the date set for such sale by enclosing such notice in an envelope addressed to such person at his last known address or place of business, if any, and depositing the same in the [fol. 18] United States mail, postage prepaid, and by publication for at least ten days before the date set for such sale in a newspaper of general circulation published in the county or city and county in which the property seized is to be sold; provided that if there be no newspaper of general circulation in such county or city and county, then by the posting of such notice in three public places in such county or city and county ten days prior to the date set for such sale. The said notice shall contain a description of the property to be sold, together with a statement of the amount due, including interest, penalties and costs, if any, the name of the person from whom due, and the further statement that unless the amount due, interest and penalties and costs are paid on or before the time fixed in said notice for such sale, said property, or so much thereof as may be necessary, will be sold in accordance with law and said notice.

"At any such sale, the property shall be sold by the board in accordance with law and said notice, and the board shall deliver to the purchaser a bill of sale for the personal property, and a deed for any real property so sold, and such bill of sale or deed shall vest the interest or title of the retailer or other person liable for the tax in the purchaser. The unsold portion of any property so seized may be left at the place of sale at the risk of the retailer or other person liable for the tax. If upon any such sale, the moneys so received shall exceed the total of all amounts including interest, penalties and costs due the State, any such excess shall be returned to the retailer, or other person liable for the tax, and his receipt therefor obtained; provided, however, that if any person having an interest or lien upon the property, has filed with the board prior to any such sale notice of such interest or lien the board shall withhold any such excess

pending a determination of the rights of the respective parties thereto by a court of competent jurisdiction. If, for any reason, the receipt of such retailer or other person liable for the tax shall not be available, the board shall deposit such excess moneys with the State Treasurer, as trustee for such owner, subject to the order of such retailer or other person liable for the tax, his heirs, successors or assigns.

"It is expressly provided that the foregoing remedies of the State shall be cumulative and that no action taken by the board or Attorney General shall be construed to be an election on the part of the State or any of its officers to pursue any remedy hereunder to the exclusion of any other remedy for which provision is made in this act."

Arbitrary Assessments against Consumers

"Sec. 21. If any person storing, using, or otherwise consuming in this State tangible personal property purchased from a retailer maintaining a place of business in this State neglects or refuses to pay the tax imposed by this act, the board shall make an estimate based upon any information in its possession or that may come into its possession of the sales price of the property and on the basis of said estimated sales price compute and assess the tax payable by such person, adding to the sum thus arrived at a penalty equal to ten per cent thereof. All such assessments shall bear interest at the rate of one-half of one per cent per month, or fraction thereof, from the fifteenth day after the [fol. 19] close of the period or periods, as the case may be, for which the amount of tax should have been paid to the State until the date of payment. Promptly thereafter the board shall give written notice to such person of such estimate, tax and penalty, the notice to be served personally or by mail in the manner prescribed by the provisions of section 1013 of the Code of Civil Procedure."

In addition to the penalties hereinbefore referred to, the Act contains the following penalty provisions:

"Sec. 30. Any retailer or other person failing or refusing to furnish any return hereby required to be made, or failing or refusing to furnish a supplemental return or other data required by the board, or rendering a false or fraudulent return, shall be guilty of a misdemeanor and subject

to a fine of not exceeding five hundred dollars ($500) for each such offense.

Any person required to make, render, sign or verify any report as aforesaid, who makes any false or fraudulent return, with intent to defeat or evade the assessment or determination of amount due required by law to be made, shall be guilty of a misdemeanor, and shall for each such offense be fined not less than three hundred dollars ($300) and not more than five thousand dollars ($5000) or be imprisoned not exceeding one year in the county jail or be subject to both said fine and imprisonment in the discretion of the court.

Sec. 31. Any violation of the provisions of this act, except as otherwise herein provided, shall be a misdemeanor and punishable as such."

It is provided by said Act (Sec. 25) that the State Board of Equalization shall have the power to make tax assessments, to make determination of the amount of taxes, penalties and interest due, to make and prescribe rules and regulations relating to the administration and the enforcement of the provisions of the said Act and the said Board is charged with the enforcement of the provisions thereof.

The Attorney General of the State of California is the chief legal representative and attorney for said State and for said Board and, under the Constitution and laws of said State, there is vested in him the power and imposed upon him the duty to represent the State in the commencement and prosecution and/or to direct the institution and prosecution of suits for taxes or penalties due to the State of [fol. 20] California and generally to represent the State as its attorney at law in the collection of taxes or other indebtedness due the State of California or to prosecute persons liable to penalties provided for in tax statutes including the said Use Tax Act of 1935, and it is expressly provided by said Act (Sec. 28) that at any time within three years after any amount required thereby to be collected has become due and payable, and any time within three years after the delinquency of any tax, the Board may bring an action in the courts of this State or any other state, or any court of the United States in the name of the People of California, to collect the amount delinquent, together with penalties

and interest, and that the Attorney General must prosecute such action.

The said Act contains the following provisions with reference to the distribution of taxes, interest and penalties collected and to be collected thereunder:

"Sec. 27. All fees, taxes, interest and penalties imposed and all amounts of tax herein required to be paid to the State under this act must be paid to the board in the form of remittances payable to the State Board of Equalization of the State of California, and said Board shall transmit such payments to the State Treasurer to be deposited in the State treasury to the credit of the retail sales tax fund.

There is hereby appropriated, in addition to any other moneys appropriated, the sum of one hundred forty-one thousand five hundred dollars out of the "retail sales tax fund;" of such amount one hundred thousand dollars may be expended by the Board of Equalization, twenty-five thousand dollars may be expended by the Controller, ten thousand dollars may be expended by the State Department of Finance and six thousand five hundred dollars may be expended by the State Treasurer. The balance of the moneys paid under this act and deposited in the retail sales tax fund shall, upon order of the State Controller, be drawn therefrom for the purpose of making refunds hereunder or be transferred to the general fund of the State."

The said Act contains provisions relating to reassessments, redetermination of taxes paid, and refunds for erroneous or illegal payments, and expressly provides by the [fol. 21] terms of Section 29 thereof as follows:

"No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin under this act the collection of any tax or any amount of tax herein required to be collected, but after payment of any such tax or any such amount of tax herein required to be collected under protest, duly verified and setting forth the grounds of objection to the legality thereof, the retailer or person making the payment may bring an action against the State Treasurer in a court of competent jurisdiction in the county of Sacramento for the recovery of the amount paid under protest. No such action may be instituted more than sixty days after the tax

or the amount herein required to be collected and paid to the State becomes due and payable, and failure to bring suit within said sixty days shall constitute waiver of any and all demands against the State on account of alleged overpayments hereunder. No grounds of illegality shall be considered by the court other than those set forth in the protest filed at the time of the payment of the tax or the amount herein required to be collected and paid to the State. If in any such action judgment is rendered for the plaintiff, the amount of the judgment shall first be credited on any taxes or amounts due from the plaintiff under this act, and the balance of the judgment shall be refunded to the plaintiff. In any such judgment, interest shall be allowed at the rate of six per cent per annum upon the amount found to have been illegally collected from the date of payment of such amount to the date of allowance of credit on account of such judgment or to a date preceding the date of the refund warrant by not more than thirty days, such date to be determined by the Controller.

"In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the State Treasurer to recover any amount paid hereunder, when such action is brought by or in the name of an assignee of the retailer or other person paying said amount, or by any person other than the person who has paid such amount."

V

Pertinent Rulings of Defendant

Said Use Tax Act of 1935 and the tax imposed thereby is not a bona fide revenue measure. It is a measure intended to lay and which has the effect of laying, a burden upon interstate commerce and the privilege of doing business in interstate commerce but denying to the plaintiff the right to exercise the usual incidents of ownership and of operating a railroad in interstate transportation, namely, the right to use tangible personal property purchased outside of the State of California, unless this plaintiff pays to de- [fol. 22] fendants and the State of California, a tax equal to the sales tax of the State of California. On September 5, 1935, by a resolution of the defendants comprising said State Board of Equalization, which resolution plaintiff is

informed and believes and therefore alleges has not been rescinded, said Board promulgated the following ruling:

"Whereas, question has arisen with respect to the application of the Use Tax Act of 1935 to the consumption of newsprint imported into California for use in the publication of local newspapers, and

Whereas, no newsprint whatever is manufactured in California, and less than 15 per cent thereof is manufactured within the United States, and such importation is not in competition with California industry, and

Whereas, recognition of the non-competitive character of transactions in newsprint, insofar as domestic trade is concerned, has been given by the United States Government in permitting the importation of newsprint into this country free of duty, and

Whereas, the journals of the 1935 session of the California Legislature, at which the Use Tax Act was passed, show that the object and intent of such Statute is to protect California industry from unfair outside competition not subject to the Retail Sales Tax Act of 1933, and

Whereas, the inclusion of the consumption of imported newsprint in the purview of the Use Tax Act is not required in the fulfillment of such object and intent, and

Whereas, it appears that great hardship would result upon those engaged in the publication of newspapers in California if the law should be interpreted as applying to their consumption of newsprint,

Now, Therefore, Be it Resolved by the State Board of Equalization that it is the view of this Board that the Use Tax Act of 1935 does not apply to the consumption of newsprint imported into this State in interstate or foreign commerce for the use of publishers of California newspapers.

And be it Further Resolved that those required to make returns under said Use Tax Act need not include therein as taxable, any transactions involving the consumption of such newsprint.

And be it Further Resolved that the auditing staff of this Board be instructed to govern itself in conformity with this resolution and not to report as taxable under said Act any such newsprint transactions."

Said resolution declares the purpose, nature and effect of said Use Tax Act; and that the tax imposed upon plaintiff

[fol. 23] thereunder by defendants, discriminates against plaintiff in that the same does not apply equally to all persons introducing tangible personal property into the State of California, for use therein, but is applied by said defendants only to items and articles of tangible personal property which, in the opinion of the defendants, compete with products of California manufacturers or producers. The application and operation of said tax as applied by said defendants to this plaintiff, constitutes an unreasonable and undue discrimination against this plaintiff and works great hardship upon this plaintiff and will continue to do so unless restrained by this court as prayed for herein; that the greater proportions of the items purchased by plaintiff during said second quarter period and to be hereafter purchased, upon which items defendants claim plaintiff is obligated to pay said tax, are not manufactured or produced in California and are not and were not during such second quarterly period competitive with California industries, particularly track materials, car and locomotive parts, numerous manufactured steel products, timber, sheet steel, steel tires, car heating parts, pile driver parts, locomotive journal grease, steel tubing, and numerous items manufactured especially for railroad uses.

The said State Board of Equalization did on the first day of July, 1935, promulgate and adopt Rule 11, pursuant to the terms of the California Use Tax Act of 1935, which provides as follows:

"Property Sold or Used in Interstate Commerce

The fact that tangible personal property is purchased in interstate or foreign commerce does not exempt from the tax the storage, use or other consumption of such property in this State after the shipment of the property in interstate or foreign commerce has ended.

The fact that tangible personal property is used in interstate or foreign commerce following its storage in this State does not exempt the storage of the property from the tax. Property is deemed to be stored in this State if held in this State for any period of time whatever following the delivery [fol. 24] of the property to the purchaser or the termination of the interstate or foreign shipment of the property to the purchaser."

That under the construction placed upon said Ruling 11, said defendants assert the right and threaten to exact and collect from said plaintiff, a tax upon said materials and items and each one thereof as hereinbefore specifically set forth, and unless restrained, enjoined and prohibited by an order of this court, will demand and exact from said plaintiff, the taxes provided under said Act, upon said materials and items and each one thereof.

VI

Claim for Taxes Due and Threat of Prosecution by Defendants

Under said Act, said defendants and each of them claim that there is due and payable by said plaintiff, taxes on all plaintiff's purchases of tangible personal property specifically described in plaintiff's Exhibits "A" and "B" hereunto attached, for its uses in conducting interstate transportation as hereinbefore specifically set forth and demand payment thereof, and if the plaintiff should fail or refuse to pay such taxes so demanded, said defendants and each of them, intend and directly and expressly threaten to, and unless restrained by the judgment or order of this court will, in pursuance of their said expressed intention, institute and cause to be instituted summary suits or other proceedings to compel the said payment of said tax, interest and penalties provided by said Act.

Defendants, and each of them, further threaten, in accordance with the procedure laid down in said Act, to cause summary process to be issued for the seizure and sale of personal property of plaintiff used by plaintiff as instrumentalities of interstate commerce in the necessary operation, maintenance and repair of said railroad, and thereby plaintiff's said business will be interfered with and the [fol. 25] operation of its railroad will be interfered with to its great and irreparable damage in the sum of more than $40,000, and for which plaintiff has no adequate remedy at law; and defendants and each of them threaten to and will bring repeated suits against plaintiff for further quarterly installments of said tax and subject plaintiff to a multiplicity if suits and harassing litigation to plaintiff's great and irreparable damage.

VII

Irreparable Loss and Expense

The payment of said taxes would require plaintiff to pay to the State Board of Equalization on or before July 15, 1936, the several large amounts of tax payment hereinbefore stated and to suffer the loss of use of such money and the earning value thereof until recovered by suit, if recoverable at all, and in order to comply with the requirements of the said taxing act and the demands of said defendants it is necessary for the plaintiff to incur substantial expenses in tax accounting and in keeping records of information concerning its purchases and the uses of such properties necessary to defend its rights against the imposition of such taxes and that it will be necessary to continue such accounting unless it is relieved from the necessity so to do and to pay such taxes by the injunction sought in this proceeding, and such expenses and the damages aforesaid, if so incurred, will constitute a substantial and irreparable loss to the plaintiff.

VIII

The Effect of Said Tax

The imposition of said taxes upon plaintiff, as hereinbefore alleged, under the said Act, as the same is, and has been [fol. 26] construed and applied by the said defendants and each of them, is in violation of Article I, Section 8, Clause 3, of the Constitution of the United States and Article I, Section 3, of the Constitution of the State of California and said tax constitutes a direct burden on interstate and foreign commerce contrary to and in violation of the provisions of Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2, of the Constitution of the United States and is a taking of plaintiff's property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States and Article I, Sections 3 and 13 of the Constitution of the State of California.

IX

Lack of Adequate Remedy at Law

Plaintiff is without a plain, speedy and adequate remedy at law in this or any other court of the United States or of

the State of California, and alleges that its remedy at law in the premises is inadequate in the following particulars:

(a) The only remedial procedure prescribed by said Act for the recovery of taxes paid or which may be paid by the plaintiff under said Act is to make payment of such taxes under protest and bring an action for the recovery thereof within a short period of limitation, to wit: 60 days following the payment thereof, against the State Treasurer of the State of California, in a court of competent jurisdiction in the County of Sacramento, for the recovery of the amount of taxes paid under protest; that a court of competent jurisdiction in the County of Sacramento, as plaintiff believes, is a state court of competent jurisdiction, being the Superior Court of said county; that such provision of the Act is not intended to provide for an action in a federal court, and that the term "a court of competent jurisdiction in the County of Sacramento", is not descriptive of the federal court, [fol. 27] although including within its jurisdiction the said county; and that such provision is so uncertain and indefinite that it fails to provide plainly and unequivocally a remedy at law, available to the plaintiff in the federal court, and that such question is undetermined either by decision of the state courts or federal courts.

(b) The statutory remedy at law prescribed by said Act is inadequate and incomplete in that the provisions of said Section 29, as hereinbefore quoted, show that in the action prescribed thereby for recovery of tax payments made under protest, interest may or shall be allowed, upon judgment for the plaintiff, upon the payment found to have been illegally collected, from the date of payment of such amount to the date of allowance of credit on account of such judgment or to a date preceding the date of the refund warrant by not more than 30 days, such date to be determined by the State Controller, and according to said provision, the said law fails to provide for the payment of interest for the full and complete period during which the taxpayer would be without the use of the amount of tax money so paid under protest for such time within 30 days as may be arbitrarily determined by the Controller, which lack of interest payment may extend for a longer period upon any failure to deliver such warrant to the taxpayer upon the date of its issue, and that the provisions of said statute for the pay-

ment of interest on account of the wrongful collection of such tax is indefinite and uncertain; and the said law furthermore does not provide a plain and adequate remedy at law because of the failure of said provision to state whether interest shall be allowed from the date of payment of such taxes to and collection by the retailer from the purchaser or whether interest shall run and be paid only from the date of the payment of the taxes to the State Board of Equalization, and in that respect the said remedy is not plain, certain or adequate.

[fol. 28] (c) The remedy at law which is prescribed by said Act, and particularly Section 29 thereof, is uncertain and does not provide a plain and adequate remedy at law because the same does not plainly state how and by whom payment of such taxes under protest shall be made, whether such protest shall be made by the purchaser contemporaneously with his payment of such tax to a retailer, or whether the same must be made by the retailer contemporaneously with the return and payment of such tax so collected by him to the State Board of Equalization; that a protest to be made contemporaneously with payment by the purchaser so as to avoid a waiver of right of protest or to avoid voluntary payment of such tax would necessitate a great multiplicity of protests on the part of the plaintiff in that plaintiff would be required to draw up, in legal and sufficient form, a protest stating the grounds for such protest for each and every tax payment made to any such retailer, and to deliver such protest to the retailer, at such place as such retailer might reside or have his place of business, or in the event of failure so to do, according to the provisions of said law, plaintiff would waive his right to assert the illegality of said law or to assert any grounds of illegality not sufficiently set forth in a protest duly filed at the time of the payment of the tax; and that the time when the purchaser or plaintiff would actually pay its tax, when payable to the retailer, would be the time when the same was paid to the retailer and not the time when the retailer made his return and payment of the tax to the State as a tax collector for the state. Such a procedure is and would be involved and complicated, involving a great multiplicity of protests with the attendant expense and accounting detail, and would involve expense for the employment of an attorney qualified to prepare such protests and would involve

expenses of a character not recoverable under the legal remedy provided for in said Act; and that said Act and the said Section 29 thereof, in said respects, fails to provide a [fol. 29] plain, speedy and adequate remedy at law, and that the procedure in the respects aforesaid has not been construed by the Supreme Court of the State of California.

(d) Taking into consideration the great multitude of purchases made and which will continue to be made by the plaintiff in connection with the operation of said railroad, a substantial expense in accounting, protesting and recovering by means of the prescribed statutory procedure as laid down in said Act would be involved in keeping accounts and making the calculation and claims for interest, running from the several dates of each of its numerous purchases to the time of refunds of such taxes, penalties and interest thereon, in the event of judgments for recovery thereof by the plaintiff, and such expenses would not be recoverable under the terms of said statute and would constitute an irreparable loss in a substantial amount.

(e) The statutory remedy at law prescribed by said Act is indefinite and uncertain and does not provide a plain and adequate remedy for the recovery of such taxes in that said Act fails to plainly prescribe whether the tax so paid under protest may be recovered only by the person making the payment directly to the State Board of Equalization, that is to say, the retailer, when he makes the payment to the Board, or the purchaser, when making direct payment under a consumer's return, and in that respect the said statute has not been construed by the Supreme Court of the State of California.

(f) The said statute is further uncertain in its provision relating to the rendition of judgment, to wit: the concluding paragraph of Section 29 provides that in no case shall any judgment be rendered in favor of the plaintiff in any action brought against the State Treasurer to recover any amount paid under the Act, when such action is brought by or in the [fol. 30] name of an assignee or retailer, or other person paying such amount, or by any person other than the person who has paid such amount, the said provision failing to state whether it has reference to the person making direct payment to the said Board, and in this respect the said Act has not been construed by the Supreme Court of the State of California.

(g) Plaintiff further alleges that Section 27 of said Act, hereinbefore quoted, requires such taxes, when collected, to be deposited in the State Treasury to the credit of the retail sales tax fund (not use tax fund) and contains provision for an appropriation for specified purposes and provides that all fees, taxes, interest and penalties collected under said Act in excess of said appropriation for specified purposes shall, upon order of the State Controller, be drawn therefrom for the purpose of making refunds under said Act, or be transferred to the general fund of the State; and plaintiff is informed and believes, and therefore alleges, that excepting the amount so appropriated for specified purposes, the amounts drawn for the purpose of making current refunds which are or have become due or payable, all taxes, penalties and interest so collected, are transferred and paid to the general fund of the state; that Section 29 of said Act provides for the satisfaction of judgment but does not authorize any of the defendants or the State Treasurer of the State of California, to pay such judgments, nor is there any express provision in said Act requiring the State Controller to pay the same; and no definite procedure is laid down by said Act for the payment, collection or enforcement of any judgment for the recovery of such taxes against the State Treasurer, or against the State of California, or against the State Board of Equalization; that said Act does not clearly provide an appropriation for the payment of any such judgment nor does it appear that the court's judgment is or shall be final authority for the payment of such judg-
[fol. 31] ment, but under the language of said statutes, refunds, if refunds embrace judgments, can only be made upon order of the State Controller which obviously contemplates a further and separate proceeding to secure his order rather than that the judgment itself shall be authority for the payment thereof, and in these respects, plaintiff's remedy at law is uncertain, indefinite, incomplete and inadequate.

(g) The remedy at law prescribed in said Act, or any remedy at law available to the plaintiff under the prohibition and limitation of said statute, would necessarily involve a multiplicity of actions because the only remedy available to the plaintiff is the remedy specified in said act by making each tax payment under protest and bringing suit within a short limitation period of 60 days against the State Treasurer of the State of California to recover such tax; that litigation to finally determine plaintiff's tax liability in the

premises would, according to plaintiff's experience and by the common experience in like litigation, known to the court, in all probability involve a period of time of one to two years or possibly a longer period should such litigation require final decision by the Supreme Court of the United States, which plaintiff believes would be likely, and that in the meantime, plaintiff would be required to make great multitudes of protests and to bring numerous suits at law, within 60 days after each tax payment date, and that such multiplicity of suits would involve the plaintiff in much expense, annoyance and injury which would be irreparable and thereby deny to the plaintiff a plain, speedy and adequate remedy at law.

X

Plaintiff is ready, able and willing to furnish a sufficient bond to be approved by this Court in such amount and upon such terms and conditions as may be required by this [fol. 32] Court as a condition for the issuance of any temporary restraining order or interlocutory injunction which may be granted herein.

Prayer for Relief

Wherefore, in consideration of all of the foregoing, and for as much as the plaintiff is remediless in the premises according to either the laws of the State of California or of the United States, or under the common law and remediable only in equity in this Honorable Court, plaintiff prays as follows:

1. That upon the filing of this complaint and upon the making and filing by plaintiff of a good and sufficient bond, in the form and amount approved by this Honorable Court, that there be issued forthwith, an order restraining, for the period allowed by law and pending the hearing of plaintiff's motion for interlocutory injunction, the defendants, and each of them and all persons acting under their direction or under the direction of either of them, from enforcing, proceeding to enforce or taking any measures to enforce the said California Use Tax Act of 1935, Chapter 361, Statutes of 1935 of the State of California, insofar as the defendants and each of them may apply or attempt to apply the same to the taxation of tangible personal property purchased and to be purchased by this plaintiff, as aforesaid, from points outside of the State of California and brought into said state for

storage, use or other consumption within said state by this plaintiff in operating its interstate railroad and railroad facilities aforesaid, and in conducting interstate transportation as an interstate carrier by railroad, either within or without the State of California, and that said defendants and each of them, their agents, servants and employees, and all persons acting or claiming to act under their direction or under the direction of either of them, be restrained and enjoined from imposing or collecting on account thereof, any alleged taxes, penalties or interest thereon, or from commencing any [fol. 33] prosecution or summary process against the plaintiff on account thereof, or from setting up, assessing or claiming or proceeding to set up, assess or claim, any such alleged taxes, penalties, interest, claims or demands under said law.

2. To the end that plaintiff may be protected in its business and property and saved from the hereinbefore described heavy statutory penalties and may not be subjected to a multiplicity of suits which will otherwise result, and may not suffer great and irreparable injury, loss and damage, and may be permitted to pursue and carry on its said business without unlawful hindrance and obstructions, and that its property may not be subjected to illegal liens and clouds, plaintiff prays that writs of subpoena in equity issue forthwith to the defendants to this bill, and to each of them, in their respective official capacities, to appear, make and file their answer to this bill, but not under oath, answer under oath being hereby expressly waived; and that, upon due notice thereafter, hearing and determination shall be had herein by three judges of this Honorable Court, one of whom shall be a Circuit Judge, as provided by law, or as provided by Section 380 of the U. S. Code, Ann. (Judicial Code Article 266, amended), and thereafter, that plaintiff have an interlocutory injunction against the said defendants and each of them, their agents, servants and employees, and against all persons acting or claiming to act under their direction, or under the direction of either of them, from proceeding to enforce said California Use Tax Act of 1935, Chapter 361, Statutes of 1935, of the State of California, insofar as the defendants or any of them may claim that the same applies to the taxation of tangible personal property purchased, and to be purchased, by plaintiff herein as aforesaid, from points outside of the State of California, and brought into said state for storage, use or other consumption [fol. 34] in this State by plaintiff in its business in operat-

ing an interstate railroad as aforesaid, and in conducting interstate transportation as an interstate carrier by railroad, either within or without the State of California, and that said defendants, and each of them, their agents, servants and employees, and any and all persons claiming or purporting to act in behalf of any of them or each of them, be restrained and enjoined from imposing or collecting on account thereof, any taxes, penalties or interest thereon, or from commencing any prosecution or suits, or issuing any summary process against the plaintiff on account thereof, or from proceeding or attempting to set up, assess or claim any such taxes, penalties or interest against this plaintiff, pending the final determination of plaintiff's prayer for a permanent injunction.

3. That upon the final hearing and determination upon the merits and the rendition of the final judgment herein by said statutory court of three judges as provided in said Section 380 of the U. S. Code, Ann., (Judicial Code, Article 266, amended), such Honorable Court order, adjudge and decree that the said California Use Tax Act of 1935, Chapter 361, Statutes of 1935, of the State of California, insofar as the same may, by the defendants, be claimed to be applicable to the taxation of tangible personal property, purchased and to be purchased by this plaintiff from points outside of the State of California, and brought into said state for storage, use or other consumption in this state by the plaintiff in the operation of its interstate railroad and in conducting interstate transportation as an interstate carrier, by railroad, either within or without the State of California, all as hereinbefore related in this bill of complaint, imposes a direct burden on interstate and foreign commerce contrary to and in violation of the provisions of Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2, of the Constitution of the United States, and that [fol. 35] the imposition and collection of any tax under said law against this plaintiff in the manner aforesaid, would effectuate a taking of plaintiff's property without due process of law, in violation of the 14th Amendment of the Constitution of the United States, and that plaintiff has no adequate remedy at law in the premises and is entitled to a permanent injunction, restraining the enforcement of said law in said respects, and that such Honorable Court further find that said law, in any attempted application, as hereinbefore alleged, by defendants, and each of them, against this plaintiff, be held null and void and of no effect, upon the

grounds, and for the reasons set out and alleged herein, and upon such other grounds and for such other reasons as to this Honorable Court may seem just and reasonable, and may, by this Honorable Court, be found to exist, and that a permanent injunction issue herein against said defendants, and each of them, their agents, servants and employees, and any or all persons acting, or claiming to act under their order or at their behest, restraining the enforcement and execution of all of said provisions of said California Use Tax Act of 1935, Chapter 361, Statutes of 1935, of the State of California, and any attempt to collect said taxes and penalties thereunder against this plaintiff in the manner aforesaid, and that plaintiff have such other or further relief in the premises as the nature and the circumstances of this case may require, and to such Honorable Court may seem meet, just and agreeable in equity.

Harry H. McElroy, 65 Market Street, San Francisco, California, Attorney for Plaintiff. Guy V. Shoup, 65 Market Street, San Francisco, California, Counsel.

[fol. 36] *Duly sworn to by Roy G. Hillebrand. Jurat omitted in printing.*

[fol. 37] EXHIBIT "A" TO BILL OF COMPLAINT

Southern Pacific Company, Pacific Lines

Track Material Purchased During 3 Months Ended June 30, 1936

Track Renewals and Repairs

Item	Point of Origin		Total Purchased
Bars, angle	Colorado		$12,597.50
Bolts, track	Colorado		140.73
Creepers, rail and washers	Pennsylvania		30,123.58
Frogs, steel blocks, etc.	Illinois		885.16
Joints, compromise	Ohio		116.59
Joints, Con't and washers	Pennsylvania		5,189.56
Locknuts, track	Illinois		369.72
Rail, steel	Alabama	$610,404.06	
" "	Colorado	36,976.58	
			647,380.64
Spikes, track	Pennsylvania		453.51
Ties, cross	Oregon		386.57
Ties, switch	"		7,822.17
Tongues, steel, manganese	Pennsylvania		208.95
Washers, track	Illinois	100.86	
" "	New Jersey	1,265.70	
" "	New York	932.02	
			2,298.58
Total Taxable Purchase Price			$707,973.26
Tax—3% of Total			$21,239.20

(Issued by Accounting Department, San Francisco, California, July 7, 1936.)

[fol. 38] EXHIBIT "B" TO BILL OF COMPLAINT

Southern Pacific Company, Pacific Lines

Materials and Supplies and Other Tangible Personal Property (Other Than Track Material) Purchased During 3 Months Ended June 30, 1936

Sacramento Foundries—Supplies

Item	Point of Origin	Total Purchased
Coke	Alabama	$5,354.27
Iron, pig	Utah	4,738.29
Pyrometer parts	Michigan	117.41
Stoppers, graphite	New Jersey	113.69
Syrup, corn	Illinois	978.94
Total Taxable Purchase Price		$11,302.60

Maintenance of Freight, Passenger Cars, Locomotives, and Work Equipment

Item	Point of Origin		Total Purchased
Air brake, parts	New Jersey	$124.35	
" " "	Pennsylvania	10,352.65	
			$10,477.00
American Crane, parts	Minnesota		138.40
Appliances, miscellaneous	Maryland	1,080.55	
" "	Missouri	1,334.11	
" "	Pennsylvania	3,352.28	
			5,766.94
Asbestos	Illinois		500.50
Axles driving	Pennsylvania		3,966.23
Belts, axle lighting	Ohio		2,053.38
Blooms, steel	Pennsylvania		2,774.65
Bolts and Nuts	Illinois	4,582.24	
" "	Louisiana	116.52	
" "	Minnesota	131.87	
" "	New York	209.07	
" "	Ohio	177.09	
" "	Pennsylvania	16,762.89	
			21,979.68
Bolts, stay	"		4,305.62
Booster, parts	Maryland		1,078.70
Boxes, journal	Illinois		397.19
Brakes, hand H. P.	Illinois	245.27	
" " "	Wisconsin	403.97	
			649.24
Burners and lamps	Connecticut		104.12
Car heating, parts	Illinois		5,391.29
" " "	New York		449.28
Carried forward			$60,032.22

[fol. 39] Page No. 2

Brought forward			$60,032.22
Car Lighting, parts	Connecticut	$293.47	
" " "	Illinois	1,264.83	
" " "	New Jersey	208.41	
" " "	Pennsylvania	173.37	
			$1,940.08
Carpet, Axminster	New York		643.28
Carbide	Michigan		3,750.00
Castings, miscellaneous	Illinois	237.66	
" "	Indiana	1,012.13	
" "	Iowa	748.00	
" "	Michigan	260.00	
" "	Pennsylvania	1,714.11	

Exhibit "B"—Southern Pacific Company, Pacific Lines—Continued

Item	Point of Origin		Total Purchased
Castings, miscellaneous	Washington	$147.05	
" "	Wisconsin	721.38	
			$4,840.33
Chain, steel	Wisconsin		144.86
Cloth, wire	Michigan		1,559.12
Conduit	Illinois		989.11
Copper, sheet	Connecticut	$585.46	
" "	Massachusetts	233.38	
" "	Ohio	317.80	
" "	Pennsylvania	269.29	
			1,405.93
Cord, Bell	Kentucky		635.13
Cotters	Missouri		567.97
Couplers	Pennsylvania		2,946.39
Coverings, seat	Massachusetts		109.89
Covers, head rest	North Carolina		852.00
Cylinder, R. H.	Michigan		145.00
Devices, retard	Massachusetts		105.00
Doors, steel trap	Illinois		100.94
Electrical, parts	Connecticut	440.37	
" "	Illinois	371.97	
" "	Indiana	135.48	
" "	New York	100.08	
" "	Ohio	125.47	
" "	Pennsylvania	2,740.04	
			3,913.41
Feed Water Heater Parts	Illinois	232.21	
" " " "	New Jersey	4,924.61	
			5,156.82
Ferrules, Copper flue	Connecticut	370.77	
" " "	New York	523.85	
			894.62
Carried forward			$90,732.10

[fol. 40] Page No. 3

Brought forward			$90,732.10
Forgings, miscellaneous	Colorado	$750.72	
" "	Illinois	16,091.79	
" "	Indiana	1,901.04	
" "	Michigan	190.63	
" "	Minnesota	231.60	
" "	New York	315.13	
" "	Pennsylvania	233.08	
			$19,713.99
Fringe, Curtain	Indiana		659.75
Fuses, Plug	Illinois		123.72
Gaskets	Illinois	544.50	
"	Maryland	1,334.00	
"	Missouri	1,402.12	
			3,280.62
Glass, McBeth	Pennsylvania	1,633.50	
" "	Louisiana	2,906.10	
			4,539.60
Guards, Dust	Illinois		302.94
Headlight, parts	Illinois		2,973.04
Hose, air brake	New Jersey	1,167.06	
" " "	Ohio	3,018.64	
" steam	Pennsylvania	100.89	
			4,286.59

Exhibit "B"—Southern Pacific Company, Pacific Lines—Continued

Item	Point of Origin		Total Purchased
Injector, parts	New York		$4,459.30
Insulation, boiler	Illinois		150.75
Iron, bar	Pennsylvania	$107.62	
" "	Washington	475.31	
			582.93
" flyer	Pennsylvania		538.52
" stay bolt	New Jersey		12,654.85
Joints, McLaughlin	Maryland		946.75
Lamps, tail	New York		174.37
Locks, sash	Massachusetts		175.00
Lubricator, parts	New York	1,277.79	
" "	Ohio	142.06	
			1,419.85
Lumber, Hardwood	Arkansas	587.04	
" fir and pine	Oregon	82,901.38	
			83,488.42
Knuckles	Illinois	312.00	
"	Pennsylvania	155.63	
			467.63
Nails, Common wire	Maryland		2,905.66
Packing, metallic	New Jersey	152.41	
" "	New York	3,657.95	
			3,810.36
Paint, priming	Michigan		147.44
Carried forward			$238,534.18
[fol. 41]	Page No. 4		
Brought forward			$238,534.18
Panels, agosote	New Jersey	$296.35	
" "	Washington	531.11	
			827.46
Pantosote	New Jersey	1,865.65	
"	New York	1,473.52	
			3,339.17
Paper, sheathing	Oregon		8,145.46
Pile Driver, parts	Michigan	688.50	
" " "	Wisconsin	893.00	
			1,581.50
Pins, crank	Pennsylvania		2,415.94
" taper	Illinois		382.98
Plates and Sheets	Maryland		4,224.07
Plugs, porous	Pennsylvania		447.75
Pumps, cooling	Illinois		1,465.10
Regulators S–1050–E	Connecticut	1,927.50	
" "	Illinois	217.13	
			2,144.63
Rings, buil	Kansas		9,666.89
Rods, brass	Connecticut		458.54
" bronze welding	"		956.42
" piston	Pennsylvania		315.93
Safety Valve, parts	Connecticut		559.96
Separators, train battery	New York		235.20
Springs, coil	Nebraska		405.55
Steam Heat Regulator, parts	New Jersey		101.97
Steam shovel, parts	Minnesota		1,048.40
Steel, chromium	Pennsylvania	157.32	
" "	West Virginia	196.34	
			353.66
" sheet	Maryland	6,089.94	
" "	Pennsylvania	24,296.10	
			30,386.04

Exhibit "B"—Southern Pacific Company, Pacific Lines—Continued

Item	Point of Origin		Total Purchased
Steel, stainless	New Jersey	$136.53	
" "	Pennsylvania	111.34	
			$247.87
Tape, asbestos	Illinois		289.09
Taps, staybolt	Vermont		166.93
Tires, steel	Pennsylvania		14,942.32
Torches	"		105.25
Carried forward			$323,748.26

[fol. 42] Page No. 5

Brought forward			$323,748.26
Tracks and Hangers, door	Indiana		1,284.28
Traps, steam	Michigan		127.85
Trays, smoker and cocktail	Indiana		2,593.15
Tubing, copper	Connecticut		905.36
" steel	Pennsylvania		8,995.18
Valves, gate	Wisconsin		167.48
" globe	Illinois	2,994.01	
" "	New York	737.05	
" "	Ohio	358.85	
" "	Pennsylvania	145.50	
			4,235.41
" pressure	Illinois		498.96
Washers, lock	New Jersey		159.11
" wrot	Wisconsin		847.15
Wheels, rolled steel	Pennsylvania		34,015.46
" tender	"		5,449.65
Wire, okocord	New Jersey		644.99
Total Taxable Purchase Price			$383,672.29

Lubricants and Waste for Locomotives and Cars

Item	Point of Origin		Total Purchased
Graphite	New Jersey	$132.85	
"	New York	267.85	
			$400.70
Grease, driving journal	Indiana		5,372.32
Oil, valve	Texas		10,245.68
Waste, Col. Cotton	Minnesota	6,170.06	
" " "	New York	2,552.00	
" " "	Wisconsin	2,066.03	
			10,788.09
Waste, journal box	Minnesota	7,197.30	
" " "	New Jersey	2,562.83	
" " "	Pennsylvania	138.24	
			9,898.37
Total Taxable Purchase Price			$36,705.16

[fol. 43] Page No. 6

Maintenance of Signal, Telephone and Power Lines

Item	Point of Origin		Total Purchased
Batteries, storage	New Jersey	$3,948.41	
" "	New York	930.89	
			$4,879.30
Blocks, terminal	Illinois		197.29
Bonds, signal 15'	New Jersey		524.50

Exhibit "B"—Southern Pacific Company, Pacific Lines—Maintenance of Signal, Telephone and Power Lines—Continued

Item	Point of Origin		Total Purchased
Cable, tirex	Connecticut		$495.40
" underground	Massachusetts		162.24
Circuit Breaking, attachments	New York	$219.42	
" " "	Pennsylvania	166.23	
			385.65
Cells, Dry and Condulet	New Jersey	2,429.81	
" " " "	New York	3,246.21	
" " " "	Ohio	450.80	
			6,126.82
Controller, parts	Pennsylvania		359.10
Grids, battery	Michigan		1,044.75
Groups, positive	New York		352.00
Hose, rubber	Massachusetts		117.51
Joints, insulated	New York		6,111.79
Lamps, semaphore	Indiana		351.63
" signal	Pennsylvania		142.50
Light, rotating stop	Minnesota	1,601.95	
" " "	Pennsylvania	146.30	
			1,748.25
Motor Generator, set complete	Ohio		598.00
Pins, channel	Illinois		1,122.24
Plates, storage battery	New York		365.34
Posts, fibre end	Delaware		2,810.27
Receptacles, charging	Massachusetts	222.60	
" "	New York	2,263.15	
			2,485.75
Renewals, battery	New Jersey		12,827.90
Repeater and Parts	Illinois		270.72
Signals, highway crossing	Illinois		495.90
Telephones, dispatchers	Illinois		125.70
Terminals, wire	New York		376.19
Torches, emergency	Maryland		121.00
Carried forward			$44,597 74

[fol. 44] Page No. 7

Brought forward			$44,597.74
Track signal, apparatus	Pennsylvania		270.75
Transformers	Illinois	1,415.90	
"	Missouri	408.08	
			1,823.98
Wire, bond	Louisiana	137.41	
" "	Maryland	2,164.43	
" "	New Jersey	251.58	
			2,553.42
" copper	Connecticut	4,014.48	
" "	New Jersey	12,173.13	
" "	New York	3,374.44	
" "	Pennsylvania	1,770.02	
" "	Rhode Island	1,046.10	
			22,378.17
" copper and cable	Connecticut	853.70	
" " " "	New Jersey	3,871.65	
			4,725.35
" galvanized	Maryland		181.29
" iron	Maryland	291.21	
" "	Pennsylvania	4,763.06	
" "	Rhode Island	524.55	
			5,578.82
Total Taxable Purchase Price			$82,109.52

Exhibit "B"—Southern Pacific Company, Pacific Lines—Continued

Maintenance and Replacement of Shop Machinery and Tools

Item	Point of Origin		Total Purchased
Axes	Pennsylvania		$200.88
Blades, hack saw	Michigan		353.50
Cards, resistance	Michigan		304.80
Chasers, bolt	Pennsylvania		181.44
Chisels	"		378.65
Chucks, scroll and parts	Connecticut	$110.38	
" " " "	Michigan	181.17	
" " " "	Pennsylvania	202.57	
			494.12
Compressor, parts	New Jersey		344.15
Controllers, electric	Ohio		160.00
Drills, twist	Michigan		1,013.99
Files	Pensylvania		2,092.06
Gauges, wheel and coupler	Connecticut		108.33
Gear draft minor	New York	4,130.18	
" " "	Pennsylvania	1,705.82	
			5,836.00
Carried forward			$11,467.92

[fol. 45]

Brought forward			$11,467.92
Generator, parts	Wisconsin		3,007.14
Grease Gun, parts	"		503.02
Guards, light globe	Indiana		135.48
Hammers	New Jersey		125.60
Hose, air tool	Pennsylvania		1,084.87
Jacks, journal	Pennsylvania		620.89
Lathe, parts	Illinois		325.00
Oil and Waste saving machine	New York		760.00
Oxygen	Indiana		117.27
Packing, searing	New Jersey		129.15
Pumping Jack, parts	"		182.70
Reamers	Michigan		103.96
Riveting Hammer, parts	"		248.24
Saws	Ohio		120.41
Expanders, tube	"		130.24
Steel, tool	Michigan	101.61	
" "	New York	205.68	
" "	Pennsylvania	1,994.04	
			2,301.33
Taps	Pennsylvania	236.45	
"	Vermont	124.37	
			360.82
Thor Drill, parts	Illinois		257.20
Vises	Rhode Island		126.13
Wheels, grinding	Massachusetts	1,481.87	
" "	New York	966.41	
			2,448.28
Wrenches	Connecticut	776.89	
"	New York	554.86	
			1,331.75
Total Taxable Purchase Price			$25,887.40

Exhibit "B"—Southern Pacific Company, Pacific Lines—Continued

fol. 46] Page No. 9

Stationery

Item	Point of Origin		Total Purchased
Stationery and blank forms	Illinois	$1,249.02	
	New Jersey	168.05	
	New York	138.13	
	Ohio	1,741.84	
	Oregon	1,727.00	
	Pennsylvania	512.40	
	Washington, D. C.	560.00	
	Wisconsin	1,916.17	
			$8,012.61
Total Taxable Purchase Price			$8,012.61

Track and Roadway Tools

Item	Point of Origin		Total Purchased
Bits, track drill	Illinois		$149.94
Bowl, cement mixer	New Jersey		110.00
Cars, section motor	Minnesota		413.60
Chisels, track	Ohio		1,646.40
Concretor, on wheels	Indiana		1,046.64
Discer, ballard	Wisconsin		323.37
Drills, shank	Michigan		108.91
Forks, ballard	Indiana		696.63
Jacks, track	Pennsylvania		297.00
Parts, compressor	New York		190.15
Parts, section motor car	Illinois	6,298.79	
	Michigan	2,207.78	
	Minnesota	6,017.75	
	Pennsylvania	891.10	
	Wisconsin	136.20	
			15,551.62
Picks, track	Kentucky		2,640.43
Saws, cross cut	Ohio		192.24
Shovels, track	West Virginia		282.73
Spark plugs	Ohio		693.66
Tape, measuring	Michigan		214.26
Total Taxable Purchase Price			$24,557.58

[fol. 47] Page No. 10

Train, Station and Yard Supplies

Item	Point of Origin		Total Purchased
Briquets, charcoal	Michigan		$2,535.00
Brushes, car cleaning	Michigan		136.71
Bunting	New York	$152.89	
"	Virginia	352.19	
			505.08
Burners, signal lamp	Indiana		297.94
Clubs, brake	Kentucky		630.63
Cord, bell	Kentucky		176.24
Crayons	Missouri		103.88
Fuses and torpedoes	Indiana		12,870.00
Globes, lantern	New York		2,668.59
Heads, mop	Alabama		267.48
Hose, water	New Jersey		100.82
Lamps, table	Connecticut		101.66
" base	New Jersey		263.72

Exhibit "B"—Southern Pacific Company, Pacific Lines—Continued

Item	Point of Origin		Total Purchased
Lanterns, inspectors	New York		$301.35
Locks, switch	Indiana		714.34
Mantles, gas	Connecticut		503.05
Padlocks	Connecticut	$136.79	
"	Pennsylvania	574.40	
			711.19
Parts, train signal	Connecticut	276.58	
" " "	Pennsylvania	2,043.94	
			2,320.52
Seats, car	Illinois		2,415.50
Sponges	New York		266.54
Tissue, toilet	Oregon		1,337.65
Wheels, Baggage truck	Illinois		1,097.76
Total Taxable Purchase Price			$30,325.65

[fol. 48]

Exhibit "B"—Southern Pacific Company, Pacific Lines—Repair and Maintenance Material and Supplies for Bridges, Buildings Equipment and Water and Fuel Pumping Plants.

Page No. 11

Item	Point of Origin		Total Purchased
Burlap	Oregon		$473.66
Camera and fixtures	Illinois		1,961.96
Cloth, brass wire	Michigan		779.72
" iron wire	Ohio		452.42
" Jewels	Massachusetts		981.54
" steel	Ohio		226.55
Distillate	Wyoming		498.80
Extract, chestnut	North Carolina		2,435.40
Hose, water	New Jersey	$491.26	
" "	Pennsylvania	505.87	
			997.13
Iron, ingot	Pennsylvania		264.43
" ulster	New Jersey		141.01
Joints, expansion	Illinois		253.33
Leathers, pump cup	Pennsylvania		101.79
Lubricators, rail and flange	Illinois		4,999.87
Lumber, cedar	Oregon	4,052.90	
" "	Washington	195.23	
			4,248.13
" fir and pine	Oregon		62,081.11
Metal, expanded	Ohio		4,338.20
Piling	Oregon		4,980.35
Pipe, black iron	New Mexico	285.25	
" " "	Pennsylvania	1,585.98	
			1,871.23
" fittings	Illinois		969.27
Carried forward			$93,055.90

[fol. 49] Page No. 12

Brought forward			$93,055.90
Pipe, galvanized iron	Illinois		745.54
" stand	"		106.40
" steel	"	825.19	
" "	Pennsylvania	1,388.81	
			2,214.00

Exhibit "B"—Southern Pacific Company, Pacific Lines—Repair and Maintenance Material and Supplies for Bridges, Buildings Equipment and Water and Fuel Pumping Plants—Continued

Item	Point of Origin	Total Purchased
Preparakote	Michigan	$ 192.91
Press, single color	Ohio	4,702.50
Pump and parts	New Jersey	1,723.91
Pump, sump	Michigan	135.24
Shovels, round point	West Virginia	282.73
Spikes, boat	Oregon	176.40
Steel, bridge	Indiana	62,514.96
Stringers	Oregon	13,182.33
Ties, bridges	Oregon	472.65
Tires, rubber	Michigan	142.21
Valve, Chamber complete	Ohio	168.40
" flange and gate	Illinois	128.25
Washers	Illinois	1,320.96
Water column, parts	Illinois	121.85
Total Taxable Purchase Price		$181,387.14
Miscellaneous Material		
Material and Supplies Purchased in States Other than California in Lots of Less than $100.00 Each		98,257.41
Total Taxable Purchase Price		$98,257.41

[fol. 50]

Exhibit "B"—Southern Pacific Company, Pacific Lines—Recapitulation

Page No. 43

Sacramento Foundries—Supplies	$11,302.60
Maintenance of Freight and Passenger Car, Locomotives and Work Equipment	383,672.29
Lubricants and Waste for Locomotives and Cars	36,705.16
Maintenance of Signal, Telephone and Power Lines	82,109.52
Maintenance and Replacement of Shop Machinery and Tools	25,887.40
Stationery	8,012.61
Track and Roadway Tools	24,557.58
Train, Station and Yard Supplies	30,325.65
Repair and Maintenance Material and Supplies for Bridges, Buildings, Equipment and Water and Fuel Pumping Plants	181,387.14
Miscellaneous Minor Material and Supplies	98,257.41
Total Taxable Purchase Price	$882,217.36
Tax—3% of Total	$26,466.52

(Issued by Accounting Department
San Francisco, California, July 8, 1936)

[fols. 51-53] [File endorsement omitted.]

[fol. 54] IN UNITED STATES DISTRICT COURT

[Title omitted]

[fol. 55] MOTION FOR TEMPORARY RESTRAINING ORDER AND APPLICATION FOR HEARING FOR INTERLOCUTORY INJUNCTION —Filed July 10, 1936

Comes now the plaintiff, and upon its verified bill of complaint heretofore duly filed herein, files this, its motion,

pursuant to Section 380 of the U. S. Code Ann. (Judicial Code Article 266, amended), for the issuance of a temporary restraining order, upon the grounds and in the manner set forth in said bill of complaint, to prevent immediate, great and irreparable injury, loss and damage, which otherwise would result to the plaintiff, before the hearing and determination of the application for an interlocutory injunction herein may be had, or notice thereof, be served, particularly because of said plaintiff's statutory liability to pay, on or before the 15th day of July, 1936, the taxes alleged by defendants to be due from plaintiff under certain provisions of the California Use Tax Act of 1935, Chapter 361, Statutes of 1935, of the State of California, claimed herein to be unconstitutional, illegal and void; and because, in failing to so pay said taxes on or before said due date, said plaintiff would become immediately liable for the gross amount of said taxes and by way of statutory penalty for a sum in addition to said total amount of said taxes, equal to 10% thereof, and a further additional sum equal to one-half per cent thereof, calculated upon the total amount of said taxes from the day upon which said taxes become due and payable to the date of payment thereof, and said plaintiff further makes this its application to this court for a hearing on this cause for an interlocutory injunction, in accordance with the prayer of said bill of complaint and in accordance with Section 380 of the U. S. Code Ann., (Judicial Code Article 266, amended).

H. H. McElroy, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 56] In United States District Court

[Title omitted]

[fol. 57] Order Noticing Necessity for Other Judges, Issuing Temporary Restraining Orders and Order to Show Cause for Temporary Injunction—Filed July 10, 1936

The verified bill of complaint in the above entitled cause having been presented, and a bond conditioned in the sum of Fifty Thousand and no/100 ($50,000.00) Dollars, the amount

fixed by this court, having been executed and the same having been approved by the court as to form and sufficiency, said bill of complaint is hereby approved.

The constitutionality of an act of the Legislature of the State of California, is attacked in said bill of complaint, calling for the determination of whether or not an interlocutory injunction shall be issued and a court consisting of three United States judges, one of whom shall be a Circuit Judge, under Section 380, Title 28, U. S. Code Ann. (Judicial Code Article 266, amended) is required. The facts alleged in said bill of complaint show that immediate and irreparable injury, loss and damage will result to the plaintiff before notice can be served, and a hearing had thereon, it appearing to the court that the collection of the taxes sought to be enjoined herein are due and payable on or before the 15th day of July, 1936, and unless said taxes are paid on said day or the collection thereof be enjoined by a temporary restraining order, said plaintiff will be assessed a penalty of 10% of the amount of such taxes together with interest on said amount and that the enforcement of such penalties and interest would work an immediate, harsh and irreparable injury to the plaintiff. This restraining order is therefore granted without notice, under the provisions of Section 381, Title 28 of said U. S. Code Ann., (Judicial Code Article 266, amended).

The defendants, John C. Corbett, Fred E. Stewart, Richard E. Collins, Ray L. Edgar and Ray L. Riley, as members [fol. 58] of the State Board of Equalization of the State of California, State Board of Equalization of the State of California, and U. S. Webb, the Attorney General of the State of California, their assistants, agents and employees are hereby restrained from enforcing, proceeding to enforce, or taking any measures to enforce, the California Use Tax Act of 1935, Chapter 361 of the Statutes of 1935, of the State of California, insofar as the defendants and each of them may apply or attempt to apply the same to the taxation of tangible personal property purchased and to be purchased by plaintiff herein, from points outside of the State of California and brought into said state for storage, use or other consumption within said State by plaintiff in operating its interstate railroad and railroad facilities aforesaid, and in conducting interstate transportation as an interstate carrier by railroad, either within or without the State of California, and that said defendants and each of them, their

agents, servants and employees, and all persons acting or claiming to act under their direction or under the direction of either of them, be and they are hereby restrained and enjoined from imposing or collecting on account thereof, any alleged taxes, penalties or interest thereon, or from commencing any prosecution or summary process against the plaintiff on account thereof, or from setting up, assessing or claiming or proceeding to set up, assess or claim, any such taxes, penalties, interest, claims or demands under said law as in said bill of complaint specifically set forth.

Let the defendants and each of them show cause, before the court consisting of three judges as provided by said Section 380, Title 28, U. S. Code Ann. (Judicial Code, Article 266, amended) at San Francisco, California at the Court Room of said Court in the Postoffice Building, July 20, 1936, at ten o'clock A. M., if any they or either of them have, why [fol. 59] a temporary injunction should not issue as prayed for in the bill of complaint.

Let subpoenas issue directed to the defendants and each of them, requiring them to appear and answer, as provided by the statute.

Let a copy of the bill of complaint in the above cause and a copy of this order and a subpoena be served upon Honorable Frank F. Merriam, Governor of the State of California, and Honorable U. S. Webb, Attorney General of the State of California.

This order signed at San Francisco, California, on the 10th day of July, 1936, at four o'clock P. M.

(Sgd.) by Michael J. Roche, United States Judge.

[File endorsement omitted.]

[fol. 60] IN UNITED STATES DISTRICT COURT

RETURN ON SERVICE OF WRIT—Filed August 12, 1936

UNITED STATES OF AMERICA,
Northern District of California, ss:

I hereby certify and return that I served the annexed Subpoena in Equity on the therein-named Frank F. Merriam, Governor of the State of California, by handing to and leaving a true and correct copy thereof together with copy of

Complaint with Francis Cochran, Secretary to Governor Frank F. Merriam, personally, at Sacramento, California, in said District, on the 15th day of July, A. D., 1936.

George Vice, U. S. Marshal, by Hayden Saunders, Deputy.

[fol. 61] IN UNITED STATES DISTRICT COURT

RETURN ON SERVICE OF WRIT—Filed August 12, 1936

UNITED STATES OF AMERICA,
Northern District of California, ss:

I hereby certify and return that I served the annexed Order to Show Cause and Temporary Restraining Order on the therein-named Frank F. Merriam, Governor of the State of California, by handing to and leaving a true and correct copy thereof with Francis Cochran, Secretary to Governor Frank F. Merriam, personally, at Sacramento, California, in said District on the 15th day of July, A. D., 1936.

George Vice, U. S. Marshal, by Hayden Saunders, Deputy.

[File endorsement omitted.]

[fol. 62] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS BILL OF COMPLAIN—Filed April 7, 1937

Come Now the defendants in the above entitled cause and move the court to dismiss the plaintiff's bill of complaint on the following grounds:

[fol. 63]

I

That the bill of complaint is without equity and the jurisdiction of the Federal Court does not affirmatively appear upon the face of the bill.

II

That it does not appear that the plaintiff is without adequate remedy at law, and the statement to the contrary in

paragraph X of the bill of complaint is without foundation of law in view of Sec. 29 of the California Use Tax Act of 1935 providing for an action to recover such tax paid under protest.

III

That no question of public interest or necessity appears on the face of the bill and it does not appear that irreparable injury or damage will follow if the bill of injunction is not granted.

IV

That the said bill of complaint does not state facts sufficient to constitute a cause of action against defendants or either of them or to entitle plaintiff to the relief prayed for or to any relief.

Wherefore, defendants pray that the order of the court heretofore entered herein granting a temporary injunction be set aside; that said application for temporary injunction be denied and that said bill of complaint be dismissed.

Dated April 6, 1937.

U. S. Webb, Attorney General; H. H. Linney, Deputy Attorney General; James J. Arditto, Deputy Attorney General, Attorneys for Defendants.

[fol. 64] Affidavit of Service by Mail

State of California,
City and County of San Francisco, ss:

The undersigned, being duly sworn, says: I am a citizen of the United States, over the age of eighteen years, a resident of the City and County of San Francisco, State of California, and not a party to the above entitled action; Harry H. McElroy & Guy V. Shoup the attorneys of record of the above-named plaintiff maintain an office at 65 Market Street in San Francisco, County of San Francisco, State of California; and between said two places there is a regular communication by mail; on the 7th day of April, 1937, I served a true copy of the Motion to Dismiss Bill of Complaint; Memorandum of Points & Authorities and Notice herein, to the original of which this affidavit is attached, on said last-named attorneys of record, by depositing said copy on said date in the post office at the said City and County of

San Francisco, enclosed in a sealed envelope addressed to said attorneys at the office thereof, and prepaying the postage thereon.

Virginia Cooke.

Subscribed and sworn to before me, this 7th day of April, 1937. James J. Arditto, Deputy Attorney General.

[File endorsement omitted.]

[fol. 65] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

In Equity. No. 4055-R

SOUTHERN PACIFIC COMPANY, a Corporation, Plaintiff,

v.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, Ray L. Edgar, and Ray L. Riley, as Members of the State Board of Equalization of the State of California; State Board of Equalization of the State of California, and U. S. Webb, the Attorney General of the State of California, Defendants

Before Denman, Circuit Judge, and St. Sure and Roche, District Judges

[fol. 66] OPINION—Filed September 10, 1937

DENMAN, Circuit Judge:

This case involves the question whether the necessary incidental storage of materials brought by an interstate railway company for installation in the service of repair and replacement under a predetermined plan for the maintenance and improvement of the service, is a use in interstate commerce. The State of California, under a general tax law applying to all persons storing within the state goods purchased without the state upon which goods no state sales tax has been paid, seeks to have included in the large number of persons subject to the statute those engaged in commerce among the states.

By the logically immediate process of federal law, the tax on these materials stored for current repairs, operation, etc., of the interstate railway is translated into the passenger fares and merchandise carriage rates of all the passengers and shippers of the thirty or forty states shipping into and out of California.[1] The persons interested in and affected by our decision, though not appearing here, are those upon whom the tax will certainly fall. Though not litigants, their interest transcends that of the corporation and its stockholders.

The Constitution gives to Congress the regulation of the management of interstate railways. If the court decides that this storage of materials is not a use in interstate commerce, then the Congress may not declare it to be or regulate it as such a use. If Congress desires to require the railways to keep in storage for current use such necessary materials it can do so only by invading intrastate activities under an [fol. 67] extension of the principles laid down in Nat. Labor Rel. Board v. Jones & Laughlin Steel Co., 81 L. ed. 563 and Edwards v. U. S. (C. C. A.-9) No. 8386, decided July 22, 1937. The delicate question of the boundary between state and federal power would seem to make proper the presence of the Attorney General of the United States, although the recent legislation requires the opportunity for his presence only where there is presented the constitutionality of a federal statute.[2]

This is a suit in equity brought before a court of three judges pursuant to section 266 of the Judicial Code[3] seeking to have enjoined pendente lite and permanently the enforcement of a statute of the State of California, namely the Use Tax Act of 1935.[4] The defendants are the California State Board of Equalization, the individual members of the board, and the Attorney General of the state. The injunctions are sought on the grounds that the enforcement of the tax in this case will unduly burden the plaintiff's interstate commerce business contrary to the provisions of Ar-

---

[1] Taxes are, of course, taken into account in determining a carrier's operating expenses or property valuation for rate fixing purposes. See N. Y. etc., Ry., 97 I. C. C. 273; Great North R. Co., 133 I. C. C. 1.

[2] H. R. 2260, approved August 25, 1937.

[3] Act of June 18, 1910, 36 Stat. 557, 28 U. S. C. A. sec. 380.

[4] Cal. Stats., 1935, ch. 361.

ticle I, section 8, of the Federal Constitution, and that there exists for the plaintiff no adequate remedy at law.

A temporary restraining order against the enforcement of the tax has been issued. The matter is now before this court on the plaintiff's prayer for interlocutory injunction and the defendants' motion to dismiss the bill. In support [fol. 68] of their motion to dismiss the defendants contend that the plaintiff has an adequate remedy at law and that the bill states no ground of relief whatsoever.

Under the assailed tax measure, later considered in detail, the defendants seek to impose against the Southern Pacific Company an excise tax upon the "storage" or "use" of personal property purchased by the company without the State of California, shipped to points within the state and there held, in accordance with predetermined plans, to be installed and made an active part of the company's tangible equipment used within the state for purposes of its inextricably interwoven interstate and intrastate commerce.

The Southern Pacific Company is a corporation of Kentucky engaged as a common carrier by railroad in seven states, including California. Half of its more than 8,000 total mileage is in California. Its gross operating revenue for the calendar year 1935 was more than $124,000,000 of which $63,000,000 was earned on California business. Of this latter figure over $34,000,000 was attributable to interstate commerce.

The specific personal property against the use of which the excise is sought to be enforced consists of a great variety of material necessary for the conduct of plaintiff's intermingled interstate and intrastate business. A portion of it was purchased for integration in plaintiff's railroad system pursuant to an existing maintenance program for the year 1936. The remainder was acquired to have on hand for the recurring demands of maintenance and emergency requirements. Among other articles the property purchased included rails, frogs, switches, valve oil, lumber, [fol. 69] stationery and tools. The complaint alleges that the greater portion was specifically designed for use in the operation, maintenance and repair of the road, or "peculiarly adapted to railroad uses * * * and * * * not suitable for any other use." The articles were all required for the efficient and economical conduct of the road.

Concerning the interstate commerce purposes of these purchases, the complaint alleges:

"Said purchases were made by the plaintiff through the use of its operating capital consisting of money or current assets definitely devoted to the service of transportation, or through the credit of said plaintiff as a railroad engaged in the service of transportation and upon the purchase of said materials and the payment therefor, the expenses therefor are in due course charged into the operating expenses of said carrier to the appropriate accounts for operation, maintenance or repairs, according to the accounting rules and regulations prescribed for railroads engaged in interstate commerce under the provisions and requirements of the Interstate Commerce Act, and that all of said items of tangible personal property so purchased by the plaintiff were devoted to the service of transportation immediately upon their purchase and that upon the purchase of said articles they immediately became a necessary and indispensible part of working capital, material, supplies, equipment and instrumentalities for the operation of said railroad and the said articles and each and all of them became, were and are instrumentalities used indiscriminately and inseparably in the operation, maintenance and repair of plaintiff's railroad for conducting interstate transportation and intrastate transportation from the time the same were purchased therefor, and any storage, use or consumption thereof, which occurred within the State of California cannot be separated or segregated as between intrastate and interstate transportation, the said railroad contemporaneously carrying by means of the same organization and facilities, both intrastate and interstate commerce and said items and materials being from the time of purchase outside the State of California inextricably devoted to and used in service of both classes of commerce."

And further:

"* * * that prior to any keeping or retention of said materials within the State of California, said materials were allocated and dedicated to sole and exclusive use in interstate commerce and any keeping or retention thereof within the State of California was and is an inseparable part of the use of said materials and each item thereof in interstate commerce."

The gravamen of these allegations is thus perceived to be that any "keeping" or "storage" of the property within

[fol. 70] the state is a use of the property in interstate commerce preparatory to a subsequent use by way of actual physical consumption.

During the three months ending June 30, 1936, the property described in the complaint, purchased outside of and shipped into California, amounted to $1,590,190.62. The use tax assessed on this material totals $47,705.72.

The Act in question imposes an excise tax of three percent of the sale price upon the storage, use or other consumption of tangible personal property within the state.[5] Leaving out of account the alleged character of the properties as instrumentalities of interstate commerce, the plaintiff's exercise of uses incidental to ownership over them within the state comes within the broad definitions of the statute.[6]

[fol. 71] Exempt from the operation of the tax are materials protected from excise by the Federal or State Constitution, and material upon which the California three percent sales tax has been paid.[7] Thus it is observed that

---

[5] Cal. Stats., 1935, ch. 361.

"Sec. 3. An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State at the rate of three per cent of the sales price of such property.

"Every person storing, using or otherwise consuming in this State tangible personal property purchased from a retailer shall be liable for the tax imposed by this act * * *."

[6] Sec. 2. * * *

"(a) 'Storage' means and includes any keeping or retention in this State for any purpose except sale in the regular course of business of tangible personal property purchased from a retailer.

"(b) 'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business."

* * * * * * *

[7] "Sec. 4. The storage, use or other consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this act:

"(a) Property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed

the use tax is complementary to the sales tax, being designed to reach purchasers who acquire personal property in other states.

If the property taxed is purchased from a retailer maintaining a place of business within the State of California, the purchaser pays the tax to the retailer and the latter pays it to the State Board of Equalization. If the retailer maintains no place of business within the state, the purchaser pays the board directly. In either case returns and payments are due quarterly (sections 6, 7).

In the event of non-payment the board may file with any county clerk a certificate showing due determination of the tax and the failure to pay. Upon such filing the county clerk is required to enter a judgment for the state against the delinquent. The judgment is subject to execution in the usual manner, and in addition it becomes a lien upon any real property owned by the delinquent within the county (section 20). In addition to this procedure, the board is em- [fol. 72] powered to bring an action in any court of competent jurisdiction to recover the tax at any time within three years after it becomes due (section 28).

The taxpayer is afforded but one remedy to recover taxes illegally exacted. He may pay under protest and bring an action in the state court.[8]

---

by Chapter 1020, Statutes of 1933 and any amendments made or which may be made thereto.

"(b) Property, the storage, use or other consumption of which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State."

[8] "Sec. 29. No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin under this act the collection of any tax or any amount of tax herein required to be collected; but after payment of any such tax or any such amount of tax herein required to be collected under protest, duly verified and setting forth the grounds of objection to the legality thereof, the retailer or person making the payment may bring an action against the State Treasurer in a court of competent jurisdiction in the county of Sacramento for the recovery of the amount paid under protest. No such action may be instituted more than sixty days

[fol. 73] The bill alleges that the defendants will, unless restrained, take summary action to collect the more than $40,000 alleged to be due upon the property purchased during the quarter ending June 30, 1936. It further states that like or greater amounts of property will be purchased during quarter years to come. Temporary and permanent injunctions are asked against future exactions as well as the claim for the second quarter of 1936.

The defendant's motion to dismiss raises questions which have narrowed to two: (A) Does there exist for the plaintiff an adequate remedy at law? (B) Is the threatened exaction void for repugnance to the Federal Constitution?

(A) We hold that the plaintiff has no adequate remedy at law.

Plaintiff presents several reasons to support its contention that, if the tax is unconstitutional, it has no adequate legal remedy. It will be necessary to consider only one of the

---

after the tax or the amount herein required to be collected and paid to the State becomes due and payable, and failure to bring suit within said sixty days shall constitute waiver of any and all demands against the State on account of alleged overpayments hereunder. No grounds of illegality shall be considered by the court other than those set forth in the protest filed at the time of payment of the tax or the amount herein required to be collected and paid to the State.

"If in any such action judgment is rendered for the plaintiff, the amount of the judgment shall first be credited on any taxes or amounts due from the plaintiff under this act, and the balance of the judgment shall be refunded to the plaintiff. In any such judgment, interest shall be allowed at the rate of six per cent per annum upon the amount found to have been illegally collected from the date of payment of such amount to the date of allowance of credit on account of such judgment or to a date preceding the date of the refund warrant by not more than thirty days, such date to be determined by the Controller.

"In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the State Treasurer to recover any amount paid hereunder, when such action is brought by or in the name of an assignee of the retailer or other person paying said amount, or by any person other than the person who has paid such amount."

grounds urged, which ground, in our opinion, is controlling.

The Use Tax Act provides but one forum for the recovery by suit at law of taxes paid under protest (Section 29, note 8, supra). This forum is "a court of competent jurisdiction in the county of Sacramento". Obviously this provision contemplates a suit only in the state court.

When a bill in equity is brought in a federal court, the test of the adequacy or lack of adequacy of the remedy at law is the legal remedy afforded in the federal court. Where no legal remedy exists in that forum, the remedy at law is inadequate. This conclusion is impelled by a consideration of the nature of the right to sue in the federal courts. It is a substantial constitutional right. Arrowsmith v. Gleason, 129 U. S. 86. When one has a cause of action at law, and [fol. 74] there exist requisites of federal jurisdiction, his remedy at law is the right to sue in the state or federal tribunal at his election. To deprive him of this choice materially impairs the completeness and adequacy of his remedy.

In Smyth v. Ames, 169 U. S. 466, 515, 516, 517, a statute of Nebraska set up a board to prescribe maximum railroad rates. Any railroad deeming itself aggrieved was permitted to bring an action in the supreme court of the state to show that the rates fixed were unjust. If the state court sustained the contention of the railroad it was authorized to issue an appropriate order to the board requiring a correction of the inequity.

Suit was brought by a railroad company in the United States District Court to enjoin the enforcement of the statute. The Supreme Court of the United States held that a case of equity jurisdiction was made out, saying:

"* * * The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal Court, is not to be conclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. * * * A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized

acts of its own officers, to suits for redress in its own courts'."

In Chicago, B. & Q. Ry. v. Osborne, 265 U. S. 14, 16, a railroad company brought suit in the federal court to restrain the collection of taxes levied by the State of Nebraska which taxes were alleged to be unjustly discriminatory. The state law provided a remedy by writ of error to the Board of Equalization from the supreme court of the state. In holding that the taxpayer was authorized to seek federal equity relief, the United States Supreme Court said:

[fol. 75] "If an action to recover the payment were allowed, the suit might be brought in the Courts of the United States, under the usual conditions, as well as in those of the State. * * *. But the writ of error, of course, can be sued out only in the State, and a remedy in the State Courts only has been held not to be enough. Smyth v. Ames, 169 U. S. 466, 516. St. Louis-San Francisco Ry. Co. v. McElwain, 253 Fed. 123, 136. Franklin v. Nevada-California Power Co., 264 Fed. 643, 645."

The principle was reaffirmed in Risty v. Chicago, etc. Ry. Co., 270 U. S. 378, 388:

"* * * the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts. Smyth v. Ames, 169 U. S. 466; Chicago B. & Q. R. Co. v. Osborne, supra."

(B) We hold that the tax sought to be levied upon the plaintiff is an unconstitutional burden on interstate commerce.

The tax in question is laid upon the exercise of certain rights of ownership over personal property; these rights being enumerated in the broad statutory definitions of "use" and "storage" (footnote 6, supra). It is not an ad valorem property tax, admittedly valid although the property consist of instrumentalities of interstate commerce, nor is it a tax on the privilege of doing an intrastate business, upheld in Pacific Telephone Co. v. Tax Commission, 297 U. S. 403.

The plaintiff does not urge constitutional objections other than the contention that the enforcement here will unduly

burden interstate commerce. And even under this heading there can be no objection to the excise on the ground that the materials were imported into the state before the incidence of the tax. Henneford v. Silas Mason Co., 300 U. S. 577.

The question narrows, then, to the issue whether at any time after their importation into the State of California, [fol. 76] the materials purchased by the plaintiff were not in use in interstate commerce. If they at all times were in actual interstate commerce use or intermixed interstate-intrastate commerce use, that use cannot be subjected to a state tax. It is well settled that such a tax constitutes a forbidden burden on interstate commerce. Helson and Randolph v. Kentucky, 279 U. S. 245, 249, 252; Bingaman v. Golden Eagle Western Lines, 297 U. S. 626, 628; Cooney v. Mountain States Tel. Co., 294 U. S. 384, 393.

By their motion to dismiss the defendants admit the facts pleaded in the complaint. That is, they admit that the items of property they seek to tax "were devoted to the service of transportation immediately upon their purchase", that their financing and accounting was carried on "according to the accounting rules and regulations prescribed for railroads engaged in interstate commerce under the provisions and requirements of the Interstate Commerce Act", that each item was an essential and vital factor in the maintenance and repair of plaintiff's interstate commerce plant, that at all times since their purchase "said materials were allocated and dedicated to sole and exclusive use in interstate commerce and any keeping or retention thereof within the State of California was and is an inseparable part of the use of said materials and each item thereof in interstate commerce."

Thus defendants admit the factual contention that plaintiff's use of the purchased materials at all times since their purchase was a vital use in interstate commerce. Nevertheless they urge that as a matter of law the only interstate commerce use which is free from state taxation is use by way of actual physical consumption or use occurring after the materials have been installed in the operating plant, such as the gasoline being consumed in the Helson and [fol. 77] Bingaman cases, or the telephone instruments actually installed in the Cooney case.

The statute specifically exempts property protected from taxation by the Constitution. While this does no more than

declare what already is the law, it demonstrates the solicitude of the legislature toward the recognition of constitutional limitations. It indicates that when the legislature defined taxable storage and use it was anxious to insure that interstate commerce use would be protected. Yet defendants would have the statute read:

"(a) 'Storage' means and includes any keeping or retention in the State * * * of tangible personal property (when such keeping or retention is an inseparable part of the use of such property in interstate commerce, when such property is allocated and dedicated to interstate commerce from the moment of its purchase and is recognized by the Federal Government through the Interstate Commerce Commission as a portion of the capital of the taxpayer used in interstate commerce) * * *."

"(b) 'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property (which exercise of right or power is a part of the use of such property in interstate commerce prior to a subsequent use by way of consumption) * * *."

We do not believe the statute is thus to be construed. However, if this is the meaning of the act, then we are forced to conclude that it is an unconstitutional exertion of power by the state legislature.

This conclusion is impelled by a realistic approach to the facts presented by the bill. In Pacific Telephone Co. v. Tax Commission, 297 U. S. 403, 413, the Supreme Court, dealing with the validity of a state tax, repeated its earlier admonition in Gregg Dyeing Co. v. Query, 286 U. S. 472, 480: "The question of constitutional validity is not to be determined by artificial standards."

Whether a use in storage for current consumption is a [fol. 78] use in interstate commerce is a question of ultimate fact. Here the court must find or refuse to find this ultimate fact upon the admitted facts and upon those of which it takes judicial notice. It cannot use "artificial standards". It must consider actual business and industrial concepts.

The question is analogous to that presented by a merchandising company's stock for sales in the current season, stored for daily supply of its counters. If such storage is

a use other than a merchandising use, what use is it? Or take the case of a canner's stock of cans stored in his plant at th beginning of a fruit season from which stock there is daily withdrawn those required for the arriving fruit. What sort of use is the storage of these cans, if not a canning use?

Certainly any merchandiser or canner or other industrialist or business man would consider it a glaring example of the application of an "artificial standard" to say that such a storage for current consumption was not a use in the business or industry in question. He might well answer: What other business have I in which that storage has any use?

When we view realistically the facts set out in the bill, supplemented with our judicial notice of the practical necessities of a large transportation enterprise, we clearly [fol. 79] perceive that this property is used in interstate commerce from the time of its purchase.

Consider first the property purchased for and devoted to a sole, fixed and predetermined use in an existing interstate commerce maintenance program. The storage of such property is a use which is as integral a part of the interstate commerce project as are the rails over which interstate trains are actually running. It is the definite predetermined character of its purpose that makes the storage of these purchased articles of equipment as vital to the entire plant before installation as well as afterwards. The situation differs materially from that of the purchase of a body of goods a part or all of which will, in the ordinary turn of events, be used in the future in interstate commerce operations.[9]

It is no answer to say that the plaintiff might change its intention after purchasing and use the property for some purely intrastate purpose not intended at the time of purchase. Granting tha: such legal right exists, it would be as persuasive to argue that the state might tax the use of an interstate locomotive in operation on the theory that its owner is privileged to use it at any time for a purely local purpose. The question concerns not what the plaintiff might do; it concerns, rather, what the plaintiff i actually doing.

---

[9] See Nashville, Chattanooga & St. Louis Ry. v. Wallace, infra.

Likewise, property purchased for the sole, fixed and predetermined purpose of serving as "standby" or reserve [fol. 80] equipment in an interstate commerce plant is employed in interstate commerce from the time of its purchase. It is almost axiomatic that the far flung system of an interstate railroad cannot be conducted without the presence of reserves supplies. Unpredictable events requiring replacement and repair are of daily occurrence. A flood washes out a section of track. Can it rationally be argued that the rails and ties held in readiness against this emergency are not an integral portion of the company's interstate commerce equipment? One might as well contend that a derail switch is not in use in interstate commerce until an emergency requires it to function.

The distinction which the defendants would have us make between property before and property after installation, whether purchased for an existing necessity or as reserve, strikes us as no more cogent than the argument that the use of a railway station could be taxed because for long periods no interstate trains stop in front of it and no interstate passengers or freight make use of it; or the argument that the use of a locomotive is taxable by the state during the period in which it is standing idle between interstate trips; or that the telephones held non-taxable in the Cooney case, supra, should be subject to excise because there were long periods when no interstate calls were being made on any one of them.

In short, a use by way of storage or retention of materials can be fully as vital to interstate commerce as a subsequent use by way of consumption or after installation. A somewhat similar situation is presented by a requirement of [fol. 81] pilotage fees which a vessel leaving or entering a harbor must render to a pilot whether or not it avails itself of his services. Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 450.

The Federal Government has recognized the interstate character of the use of materials like those described in the complaint through regulations (having the force of law) issued by an administrative agency, the Interstate Commerce Commission.[10] We do not believe that the California

---

[10] I. C. C. classification of accounts for steam railroads:

"716. Material and Supplies.

"This account shall include the balances representing the cost, less depreciation, if any, of all unapplied material such

Legislature, specifically declaring in section 4 of the Act (note 7, supra) its intention to recognize the constitutional prohibition against the taxation of the use of materials in interstate commerce, intended nevertheless to subject to taxation the use of materials not only set apart by the carrier for interstate commerce uses, but recognized as so devoted by the Federal Government.

In a case calling for the determination of whether a particular use of materials is an intrastate or an interstate use, we touch upon the boundary between state and federal power. The requirement of materials for current repairs [fol. 82] and replacement is so obviously a necessity for interstate commerce that no legislation has been needed to compel it. However, the Congress could well pass a statute requiring that:

"Interstate carriers shall purchase and store for current repairs necessary materials for the efficient conduct of their railways, said *usage* by said carriers of said materials awaiting current installation to be maintained in places convenient to the places of their installation."

To illustrate how our decision in this case may affect the scope of federal power, we assume that the above statute has been passed. In opposition to it we have the instant state use tax act which the defendants would have read:

"(a) 'Storage' means and includes any keeping or retention in this State for any purpose * * * of tangible personal property (including materials purchased and stored by interstate carriers for current repairs and maintenance necessary for the efficient conduct of their railways) * * *."

---

as road and shop materials, articles in process of manufacture by the accounting company, fuel, stationery, and dining car and other supplies. In determining the cost of material and supplies suitable allowances shall be made for any discounts allowed in the purchase thereof.

"NOTE.—Balances representing the cost of unapplied construction material and supplies located at the point of use, which have been purchased for projected new roads and extensions, are provided for in road and equipment account No. 47, 'Unapplied construction material and supplies'."

The power delegated to Congress under the commerce clause is paramount to the reserved power of the state, when the two come in conflict. Minnesota Rate Cases 230 U. S. 352, 399; National Labor Relations Board v. Santa Cruz Fruit Packing Co., (C. C. A. 9) decided July 31, 1937. Hence in such a conflict of opposing authority presented by the statutes pictured above, this court would be required to indulge every presumption in favor of the Congressional determination that the usage of materials described in both statutes was a use in interstate commerce. Ogden v. Saunders, 12 Wheat. 213, 269. Such determination being a reasonable hypothesis, we would be required to accept it as true. Against it the state statute would necessarily fall as invalid. It is because of this possible conflict that we can- [fol. 83] not apply the Bushrod Washington doctrine of Ogden v. Saunders to the state tax legislation challenged in this case.

Conversely, when the state acts within the scope of its reserved powers every presumption is indulged in favor of the validity of its legislation. Such was the case in Pacific Gas & Electric Co. v. Sacramento Municipal Utility District, No. 8500, recently decided by the Circuit Court of Appeals for the Ninth Circuit.

In support of their contention that the materials in question here are subject to the use tax, the defendants rely strongly on the case of Nashville Ry. Co. v. Wallace, 288 U. S. 249, 261, 266. In that case the railroad brought suit in a Tennessee court for a declaratory judgment holding unlawful an excise tax of that state levied upon the storage and withdrawal from storage of gasoline.

The railway purchased the gasoline from points outside the state, brought it into Tennessee and stored it in private tanks. Subsequently all of it was withdrawn from storage to be used as a source of motive power in interstate railway operations. The company assailed the tax both on the ground that the gasoline while stored was still a subject of interstate commerce and on the ground that because of its subsequent use as fuel, the tax was in effect a tax upon the use of the fuel in interstate commerce. The Supreme Court affirmed the highest court of Tennessee in decreeing that the tax was valid. In answer to the railway's first contention it said (p. 266):

"The gasoline, upon being unloaded and stored, ceased to be a subject of transportation in interstate commerce and lost its immunity as such from state taxation. * * * The fact that the oil was, in the ordinary course of appellant's business, later withdrawn from storage for use, some within and some without the state, part of it thus becoming again the subject of interstate transportation, did not affect the power of the state to tax it all before that transportation commenced."

In answer to the argument that the tax was one in effect upon the use of gasoline in interstate transportation, it [fol. 84] was held (p. 267):

"We cannot say that the tax is a forbidden burden on interstate commerce because appellant uses the gasoline *subsequent* to the incidence of the tax as an instrument of interstate commerce. Taxes said to burden interstate commerce directly when levied upon or measured by the operation of interstate commerce or gross receipts derived from it, are beyond the state taxing power * * *.

"But interstate rail carriers are not wholly immune from other forms of non-discriminatory state taxation, even though the burden of the tax is thus indirectly or incidentally imposed upon the interstate commerce in which they are engaged. It cannot be doubted that, when the gasoline came to rest in storage, the state was as free to tax it, notwithstanding its *prospective* use as an instrument of interstate commerce, as it was to tax appellant's right of way, rolling stock, or other instruments of interstate commerce, which are subject to local property taxes." (Emphasis supplied.)

Here the Supreme Court makes a finding of ultimate fact that the storage was not a use in interstate commerce. The admitted probative facts in that case upon which the finding of ultimate fact was made are not the same as in the instant case. In the case at bar the admitted fact is that the storage is an immediate and not a "prospective use" in interstate commerce.

It is plain from the above quotation that the Supreme Court did not have before it for decision in the Nashville case the question whether or not the gasoline stored was already set apart, devoted, and predetermined for use in interstate commerce before it entered the state. We have

studied exhaustively not only the opinion of the Supreme Court but also the record and briefs in that case. Nowhere do we find that the gasoline upon entering the State of Tennessee or upon its deposit in the storage tanks was allocated, set apart, and dedicated to interstate commerce uses. Nowhere do we find contention or proof that the stored gasoline was a part of the railroad's current operating inventory, recognized as such by the Federal Govern-
[fol. 85] ment. It was nowhere argued that the gasoline while in the tanks was being used in interstate commerce. As we have already indicated, property is not exempt from state use taxation merely by virtue of the fact that in the ordinary turn of events it will be used in interstate commerce, or the fact that subsequently all of it has been so used. In each case there must be facts, admitted or proved, which show that the keeping or retention is in itself a use in interstate commerce.

What we have said of the Nashville case is equally true of Edelman v. Boeing Air Transport, 289 U. S. 249, 251, 253. In that case the taxpayer purchased gasoline within and without Wyoming and stored the same in tanks at its Wyoming airports. It was subsequently withdrawn, some for local sale, some for local use, and some for fueling the taxpayer's interstate airplanes. Wyoming levied an excise tax on the use of gasoline, the incidence of the tax falling on the withdrawal from storage. The taxpayer objected to paying the excise on the fuel withdrawn for interstate planes. The Supreme Court held against the taxpayer, saying that the ruling facts of the case were identical with those in the Nashville decision.

Our examination of the Edelman decision reveals that, as in the Nashville case, there was neither contention nor proof made that the gasoline taxed was set apart or allocated by the taxpayer to an interstate use before it was actually being consumed in the planes; nor any evidence that it was in any way brought under the jurisdiction of the Interstate Commerce Commission. The case is even weaker than the Nashville decision, in view of the fact that when the gasoline was put in storage only an indefinable part of it
[fol. 86] was subsequently to be used in interstate commerce.

We hold, therefore, that the Nashville and Edelman cases are not controlling on the facts alleged in this complaint. The facts alleged and admitted here bring this case within

the principle of the Helson, Bingaman and Cooney cases. In this view it is unnecessary to consider whether the authority of the Nashville and Edelman cases is weakened by Graves v. Texas Co., 298 U. S. 393, 401, wherein it was held, without mentioning the Nashville and Edelman decisions, that a state tax levied on the withdrawal of gasoline from storage for delivery to the United States was void as being an exaction against the activities of the Federal Government.

Reaching a conclusion similar to that of the District Court for Washington, in construing like provisions of a use tax of that state,[11] we hold that the defendants may not constitutionally enforce the provisions of the California Use Tax Act against the plaintiff upon the property set out in the complaint.

The defendants are at liberty, of course, to put the plaintiff to proof of its allegations of present use of the materials as alleged in the bill. And nothing in this opinion bears upon the right of a state to levy a tax upon the intrastate use or property such as that in issue here, under any formula calculated reasonably to apportion the interstate [fol. 87] and intrastate commerce uses.

The motion to dismiss the complaint is denied. Plaintiff will be awarded an interlocutory injunction. Plaintiff will prepare and file proposed findings of fact, conclusions of law, and decree.

William Denman, U. S. Circuit Judge. Michael J. Roche, U. S. District Judge. A. F. St. Sure, U. S. District Judge.

[File endorsement omitted.]

[fol. 88] In United States District Court

[Title omitted]

Decree for Interlocutory Injunction—Filed November 16, 1937

This cause came on regularly for hearing pursuant to order to show cause issued on the 10th day of July, 1936, on plaintiff's verified complaint and motion for interlocu-

---

[11] Northern Pacific Ry. v. Henneford, 15 Fed. Supp. 302.

[fol. 89] tory injunction, and the Court having considered the record, pleadings and files herein, and the argument of counsel, and the opinion of the Court having been filed on September 10, 1937, and the Court's findings of fact and conclusions of law having been filed on the 16th day of November, 1937, and the Court having found and concluded therein that the plaintiff is entitled to an interlocutory injunction as prayed for;

Now, Therefore, it is hereby Ordered, Adjudged and Decreed as follows:

1. Pending the final determination of this action and until the further order of this Court, the defendants John C. Corbett, Fred E. Stewart, Richard E. Collins, Ray L. Edgar, and Harry B. Riley, as members of the State Board of Equalization of the State of California, State Board of Equalization of the State of California, and U. S. Webb, the Attorney General of the State of California, and each of them, their successors, and any and every person acting or attempting to act under and by virtue of the authority of the California Use Tax Act of 1935, Chapter 361 of the Statutes of the State of California for 1935, and acts amendatory thereto, and all persons to whom notice of this injunction shall come, be and they are hereby enjoined and restrained from threatening, attempting or proceeding to enforce or to take any steps to enforce said California Use Tax Act of 1935, Chapter 361 Statutes of 1935 of the State of California, as against the plaintiff herein, or any of its agents, servants and employes, on account of any claim that said California Use Tax Act applies to the taxation of tangible personal property purchased or to be purchased by plaintiff at points outside of the State of California and brought into said State for storage, use or other consumption in said State of California, by plaintiff in its business in operating an intrastate and interstate railroad and in [fol. 90] conducting intermingled interstate and intrastate transportation as a carrier by railroad, either within or without the State of California, and they and each of them are further enjoined from imposing or collecting on account thereof any taxes, penalties or interest thereon, or from commencing any prosecution of suits or issuing any summary process against the plaintiff on account thereof, or from proceeding or attempting to set up, assess or claim

any such taxes, penalty or interest against the plaintiff on account of any such purchases.

2. It is further ordered and adjudged that this decree and injunction shall become effective and operative upon the filing by the plaintiff of a bond in a form required by law, in the sum of $301,000.00, to be approved by this Court, and upon the filing of such bond the bonds heretofore filed by plaintiff as required by the temporary restraining order heretofore entered will be exonerated and discharged.

3. When any further payments under the California Use Tax Act of 1935 shall become by the terms thereof due and payable by said plaintiff, then upon the filing of a good and sufficient bond approved by the court or any judge thereof in an amount agreed upon between the parties to this cause, said interlocutory injunction shall be extended to the enforcement of said act as to any such payments; and if the parties fail to agree on the amount of such additional bond, any of the parties may move the court to take any action of which he or they may be advised.

Dated: November 16, 1937.

William Denman, United States Circuit Judge.
Michael J. Roche, United States District Judge.
A. F. St. Sure, United States District Judge.

Approved as to Form:

U. S. Webb, Attorney General, State of California, by H. H. Linney, Deputy, Attorney for Defendants.

[File endorsement omitted.]

[fol. 91] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO BILL OF COMPLAINT—Filed September 30, 1937

[fol. 92] Come Now the defendants above named, and answering the Bill of Complaint on file herein, admit, allege and deny as follows:

I

Defendants admit the allegations found in paragraph I of said complaint.

II

Defendants admit the allegations found in paragraph II of the complaint on file herein, except that said defendants deny that the tax imposed under the Use Tax Act of 1935, Chapter 361, Statutes 1935 of the State of California, constitutes a tax upon the use of said materials in carrying on interstate transportation, or that said tax constitutes a tax and burden upon the privilege of using said materials in conducting interstate transportation or that said tax is a burden on interstate and foreign commerce, contrary to and in violation of the provisions of Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2 of the Constitution of the United States, or that the imposition or collection of said tax effectuates a taking of plaintiff's property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, as alleged in paragraph II of said complaint.

III

Defendants admit the allegations found in paragraph III of said complaint on file herein except that defendants deny that the said materials were or are in the process of being transported in interstate commerce to the places of use during the time in question herein, or that said materials so distributed and held for such uses and the process of distribution thereof are inseparably and essentially a part [fol. 93] of the conduct of transportation by railway; or that the greater portion of said articles were and are especially designed for use in the operation, maintenance and repair of said railroad, or that said materials were peculiarly adapted to railroad uses as aforesaid, and are not suitable for any other use, all as alleged in paragraph III of said complaint.

Further defendants deny that all of said items of tangible personal property so purchased by the plaintiff, were devoted to the service of transportation immediately upon their purchase, or that upon the purchase of said articles they immediately became a necessary and indispensable part of working capital, material, supplies, equipment and instrumentalities for the operation of said railroad, or that said articles, and each and all of them became, were and are instrumentalities used indiscriminately and inseparably in the operation, maintenance and repair of plaintiff's rail-

road for conducting interstate transportation and intrastate transportation from the time the same were purchased therefor; or that said items and materials were inextricably devoted to and used in service of both classes of commerce from time of purchase outside of the State of California, all as alleged in paragraph III of said complaint on file herein.

Defendants further deny that said articles of tangible personal property sustained no storage of any character which intervened between the ending of the interstate transportation thereof which followed the purchase of said items of property and the time when the same and each item thereof was allocated and dedicated to uses in the conduct of transportation by plaintiff's railroad, or that the said materials and each item thereof were purchased by said [fol. 94] plaintiff outside of the State of California, for the sole and exclusive use and conduct of its business as an interstate carrier, or that at all times from the purchase of said materials until use of said materials and each item thereof by said plaintiff, said materials were devoted, dedicated and inseparably set apart exclusively for interstate commerce, or that prior to any keeping or retention of said materials within the State of California, said materials were allocated and dedicated to sole and exclusive use in interstate commerce or any other type of commerce, or that any keeping or retention of said materials within the State of California was and is an inseparable part of the use of said materials and each item thereof in interstate commerce, or any other type of commerce, all as alleged in paragraph III of said complaint.

IV

Defendants admit the allegations found in paragraph IV of said complaint on file herein.

V

Defendants admit the allegations found in paragraph V of said complaint on file herein, except that defendants deny that the Use Tax Act of 1935 and the tax imposed thereby is not a bona fide revenue measure or that it is a measure intended to lay, and which has the effect of laying a burden upon interstate commerce, and the privilege of doing business in interstate commerce, or that it denies to the plain-

tiff the right to exercise the usual incidents of ownership or that it denies to plaintiff the right to operate a railroad in interstate transportation, all as alleged in paragraph V of said complaint on file herein.

Further defendants deny that the resolution passed on [fol. 95] September 5, 1935, by the State Board of Equalization, declares the purpose, nature and effect of said Use Tax Act, or that the tax imposed upon plaintiff thereunder by defendants discriminates against plaintiff in that the same does not apply equally to all persons introducing tangible personal property into the State of California for use therein, or that said Act is applied by said defendants only to items and articles of tangible personal property, which in the opinion of the defendants, compete with products of California manufacturers or producers, or that the application or operation of said tax as applied by these defendants to this plaintiff, constitutes an unreasonable and undue discrimination against this plaintiff, or that said Act as applied herein works great hardship upon this plaintiff, and will continue to do so, unless restrained by this Court, as prayed for in said complaint, all as alleged in paragraph V of said complaint.

VI

Defendants admit the allegations found in paragraph VI of said complaint on file herein.

VII

Defendants admit the allegations found in paragraph VII of said complaint on file herein.

VIII

Defendants deny that the imposition of said taxes upon plaintiff as alleged in said complaint under the said Act, as the same is, and has been construed and applied by said defendants, and each of them, is in violation of Article I, Section 8, Clause 3 of the Constitution of the United States, and Article I, Section 3, of the Constitution of the State of California, or that said tax constitutes a direct burden on [fol. 96] interstate and foreign commerce, contrary to and in violation of the provisions of Article I, Section 8, Clause

3, and Article I, Section 10, Clause 2 of the Constitution of the United States, or that the tax is a taking of plaintiff's property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and Article I, Sections 3 and 13 of the Constitution of the State of California, as alleged in paragraph VIII of the said complaint on file herein.

IX

Defendants admit the allegations found in sub-division (a) of paragraph IX of the complaint on file herein, but deny all the remaining allegations of paragraph IX of said complaint on file herein.

As a separate, further and distinct answer, defendants allege as follows:

I

That subsequent to the date that the tangible personal property referred to in the Bill of Complaint on file herein was purchased, and at all times prior to the date when said property was installed, after interstate transportation of the property had ended, the property was not used in plaintiff's interstate railroad business, or in plaintiff's inextricably intermingled intrastate and interstate railroad business.

II

That subsequent to the time that plaintiff purchased, outside of the State of California, the said property, and after the interstate transportation of said property into the State of California had ended, the said property was stored in the State of California and placed in plaintiff's private [fol. 97] warehouse, or on plaintiff's private property for some period of time prior to the date that plaintiff actually installed said property in its railroad system or actually used the same in its inextricably intermingled interstate and intrastate railroad business.

III

That plaintiff after the interstate transportation of said tangible personal property had ceased, and after the property was stored at points in the State of California, and

subsequent to the date of installation of the same into plaintiff's railroad system, used or will use all of said property in conducting its inextricably intermingled interstate and intrastate railroad business.

IV

That the State Board of Equalization has demanded payment of the use tax from plaintiff for the privilege of storing said property in the State of California after interstate transportation of the same has ended and prior to installation of the same, and further for the privilege of using the property in its intrastate railroad business only; that the amount of the tax was not increased because plaintiff used the property in its interstate railroad business.

V

That the plaintiff at the time of the shipment of said tangible personal property from points of origin did not arrange a destination for the property other than plaintiff's points of storage in the State of California.

VI

That plaintiff was free to use the property in its railroad business or for any other purpose after transportation had ceased and the property was stored in the State of California.

[fol. 98] Wherefore, defendants pray that plaintiff take nothing by its action herein, that the Bill of Complaint be dismissed, for costs of suit, and for such further relief as the Court may deem meet and proper in the premises.

U. S. Webb, Attorney General; H. H. Linney, Deputy Attorney General; James J. Arditto, Deputy Attorney General, Attorneys for Defendants.

(Due service and receipt of copy of the within Answer admitted this 30th day of September, 1937.)

Harry H. McElroy, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 99] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION OF FACTS—Filed December 22, 1937

In addition to the facts alleged in the bill of complaint and which are admitted by defendant's answer filed herein, it is stipulated that the following are admitted facts for the purposes of this action and for such purposes only, to wit:

[fol. 100] Plaintiff's Railroad Operations

1. Whenever plaintiff's "railroad" or "railroad transportation plant" or "railroad operations" are hereinafter referred to in this stipulation, the same shall refer to and mean the plaintiff's railroad plant, facilities or railroad operations inseparably devoted to the service of intrastate, interstate and foreign transportatior Whenever the term "conducting transportation" is hereinafter used, it shall refer to conducting transportation inseparably in intrastate, interstate and foreign commerce. Hereafter the use of the present tense indicates a continuous course of action during all of the time material to the issues in this action.

2. Plaintiff's interstate and intrastate railroad system, described in the complaint, is inseparably and inextricably devoted to the services of intrastate, interstate and foreign transportation and commerce, the same rails, the same facilities, and the same organization being devoted to and used inseparably in plaintiff's said transportation enterprise. All branch lines of railroad forming a part of plaintiff's transportation plant within the State of California carry interstate transportation as well as intrastate transportation, and every part of said railway transportation plant is subject to interstate and foreign uses as well as intrastate uses. The branch lines of railroad are feeder and distribution lines appurtenant to the main interstate lines and are an essential and useful part of plaintiff's railroad plant in the handling of interstate and foreign commerce as well as intrastate commerce.

Purchases of Property by Plaintiff

3. In the necessary operation, maintenance and repair of plaintiff's railway transportation plant and the facilities

and equipment thereof, plaintiff purchases large amounts of tangible personal property consisting of equipment, facili- [fol. 101] ties, materials, supplies, shop machinery, tools, printed matter and publications, which property is described in the bill of complaint herein and in Exhibits "A" and "B" thereof, in accordance with the purposes, plans and methods hereinafter described, and in accordance with the purpose of doing and performing all of the acts and things with respect to said property, including holding and retention thereof in the State of California, which are hereinafter described. All of said purchases and the purchases hereafter to be made, which are pertinent to the issues of this case, were or will be purchases made in states other than California or in foreign countries and transported in foreign or interstate commerce into the State of California, for the uses and purposes hereinafter described. The tangible personal property described in the complaint represents typical classes of property purchased as hereinafter related, by plaintiff for its railway transportation purposes.

4. The total purchases of tangible personal property involved in this action and the taxes claimed to be due from the plaintiff on account thereof for each quarter to and including the quarter ending September 30, 1937, are as follows:

Quarter Ending	Total Price of Tangible Personal Property	Tax Claimed To Be Due
June 30, 1936	$1,590,190.62	$47,705.72
Sept. 30, 1936	1,258,022.74	37,740.68
Dec. 31, 1936	1,429,470.82	42,884.12
Mar. 31, 1937	1,989,206.12	59,676.18
June 30, 1937	1,798,360.97	53,950.83
Sept. 30, 1937	1,861,558.70	55,846.76

Accounting

5. The purchases of all property for the operation, maintenance and repair of plaintiff's railroad were and are made by the plaintiff through the use of its operating capital con- [fol. 102] sisting of money or current assets definitely devoted to the service of transportation, or through the credit of said plaintiff as a railroad engaged in the service of transportation and upon the purchase of said materials and the payment therefor, the expenses therefor were and are in

due course charged into the operating expenses of said carrier to the appropriate accounts for operation, maintenance or repairs, according to the accounting rules and regulations prescribed for railroads engaged in interstate commerce under the provisions and requirements of the Interstate Commerce Act.

6. Southern Pacific Company, as a railroad common carrier engaged in interstate commerce, is and was subject to valuation by the Interstate Commerce Commission under the Interstate Commerce Act and its valuation for rate making purposes was made by the Interstate Commerce Commission and said valuation is duly reported in Volume 45 of Interstate Commerce Commission Valuation reports, Page 1 (Decided June 10, 1933). The working capital allowed by the Interstate Commerce Commission in plaintiff's said valuation, as of the dates of basic valuation of each property included therein, as shown by said valuation report, amounted to the total sum of $19,022,626.00. The amount of working capital allowed in said valuation was segregated as follows:

Account 708-Cash	$5,277,896.00
Account 716-Material and supplies	13,744,730.00
	$19,022,626.00

The amounts carried in accounts 708 and 716 in the company's balance sheets as of the dates of basic valuation and June 30, 1936, are as follows:

[fol. 103]

	As of Date of Basic Valuation	As of June 30, 1936
Acct. 708-Cash	$14,667,978.87	$15,525,583.40
Acct. 716-Material and supplies	12,772,970.43	12,235,373.48
	$27,440,949.30	$27,760,956.88

The sum of $27,760,956.88, the amount of working capital as of June 30, 1936, is the approximate amount of working capital devoted to the service of transportation by the plaintiff at the times pertinent to this action.

7. The accounting which is performed in connection with the purchase and distribution of materials and supplies used for the maintenance, repair and operation of the plaintiff's

railroad, under accounting rules prescribed by the Interstate Commerce Commission, is in brief as follows:

Audited vouchers issued in payment of material and supplies purchased are charged to account 716- Material and Supplies, and are concurrently credited to account 760- Audited Accounts and wages payable.

When audited vouchers issued in payment for material and supplies are cashed by payees, the amount thereof is charged to account 760- Audited accounts and wages payable, and concurrently credited to account 708- Cash.

As material and supplies are issued for use in the maintenance and operation of the railroad, the value thereof is charged to account 531- Railway Operating Expenses (separately to each primary account applicable) and concurrently credited to account 716- Material and Supplies.

The uncashed audited vouchers outstanding (with exceptions not material here) remain in account 760 until paid and the debit balance in account 716 represents the amount of unapplied material and supplies remaining on hand.

[fol. 104] 8. Railroad materials and supplies are classified under the uniform classification of accounts for steam railroads prescribed by the Interstate Commerce Commission in accordance with Section 20 of the Act to Regulate Commerce as "Material and Supplies" in Account No. 716, which reads as follows:

"716. Material and Supplies

This account shall include the balances representing the cost, less depreciation, if any, of all unapplied material, such as road and shop material, articles in process of manufacture by the accounting company, fuel, stationery, and dining car and other supplies. In determining the cost of material and supplies suitable allowances shall be made for any discounts allowed in the purchase thereof.

NOTE.—Balances representing the cost of unapplied construction material and supplies located at the point of use, which have been purchased for projected new roads and extensions, are provided for in road and equipment account No. 47. 'Unapplied construction material and supplies' ".

"Unapplied material" means material purchased for specific intended use in the operation, maintenance and repair of the railroad and is carried in said Account 716 until actu-

ally placed or used for said purposes, and when actually placed and used said material is included in one of the accounts representing a disbursed expense.

The purchase price of property heretofore described was and is paid from working capital held as cash in banks for payment of current accounts and indebtedness incurred in the operation, maintenance and repair of the railroad and is known as Account 708 Cash, which reads as follows:

"708. Cash

This account shall include money, checks, sight drafts, and sight bills of exchange in the hands of the accounting company's financial officers and agents, or in transit from its agents and conductors for which such agents and conductors have received credit. It shall also include deposits with banks and trust companies subject to check.

All current expenses, including disbursements for the pur-
[fol. 105] chase of said materials and supplies are paid from said cash account 708.

Said working capital is necessary in the operation, maintenance and repair of the operating property of the said plaintiff.

9. Materials and supplies and working capital are classed in railway accounting practices, as prescribed by the Interstate Commerce Commission, as operative property, and the said working capital and materials and supplies carried in said accounts are and were at the times stated in the complaint a part of the operating property of the Southern Pacific Company. Additions and betterments to existing railway operating transportation plant are chargeable to the appropriate property accounts. Immediately upon the purchase of tangible personal property for railroad operation, maintenance and repairs of existing transportation plant, the same becomes and is subject to accounting in the manner and form hereinbefore described.

10. Taxes charged on account of the alleged storage, use or other consumption of the tangible personal property aforesaid under the California Use Tax Act of 1935, if required to be paid, would be a charge to and become a cost of conducting transportation in the same manner as other taxes against plaintiff's operating property are chargeable.

General Classes of Property Involved

11. The tangible personal property involved in this action is of two general classes: (a) property purchased to carry out a renewal or replacement of track, equipment, facilities, or structures in the existing transportation plant, which is also referred to as property purchased on specific orders; and (b) materials for current maintenance, or for use or consumption in conducting current operations, including [fol. 106] stand-by materials. Both of these classes of materials are subject to a further classification as (a) materials especially designed and manufactured upon approved specifications for railroad uses, (b) railroad materials manufactured upon plaintiff's particular specifications to meet its particular needs and purposes, and (c) general commercial materials.

12. The materials described as track materials, enumerated in plaintiff's Exhibit "A" are all materials especially designed for railroad uses and built according to approved specifications for such uses and are not practically adapted to any other uses. Some of such materials were especially manufactured to supply orders made by the plaintiff and to meet particular specifications as to quantities, quality, sizes and other characteristics defined in plaintiff's orders for such materials.

13. All property described as materials for maintenance of freight, passenger cars, locomotive and work equipment, shown by Exhibit "B", is materials especially designed and constructed for railroad uses and purposes such as air brakes parts, crane parts, axles, bolts and nuts, booster parts, journal boxes, brakes, car wheels, burners and lamps, car heating parts, car lighting parts, miscellaneous castings, steel chain, cotters, couplers, cylinder parts, retard devices, steel trap doors, miscellaneous forgings, headlight parts, airbrake hose, steam hose, lubricator parts, boiler insulation, stay bolts, tail lamps, knuckles, and all interchangeable parts for the repair of rolling stock and motive power and generally all parts for the repair of rolling stock, motive power, equipment, shop machinery and shop tools, excepting raw materials such as metal, cloth, wire, paper, glass, lumber, common wire nails, paint, oils, etc.

14. All of the materials described in Exhibit "B" as lubricants and waste for locomotives and cars such as graphite, driving journal grease, valve oil, locomotive and [fol. 107] journal box waste, are materials especially prepared for railroad purposes and uses. Such materials are manufactured to meet the common railroad specifications for such purposes.

15. All items of materials as shown by Exhibit "B" for maintenance of signal, telephone and power lines, are materials primarily manufactured for such uses and purposes. The materials, other than lines, for the maintenance of railway signal systems are especially designed for railroad uses and such materials are generally unfit for any other purposes.

16. Materials for maintenance and replacement of railway shop machinery and tools shown by Exhibit "B" are materials especially designed for such uses, but are susceptible of other uses. All repair parts for existing machinery are supplied upon particular specifications for use in the repair of a particular article of machinery and such repair parts are generally unfit for other purposes.

17. All items described as track and roadway tools shown by Exhibit "B" are articles especially constructed on specifications for railroad uses, but are susceptible of other uses, and excepting common saws, picks, shovels and other common tools usually carried in mercantile stocks for general uses.

18. A considerable part of the items described as train, station, and yard supplies, shown by Exhibit "B", are especially designed for railroad uses but are susceptible of other uses. The exceptions are those items commonly carried in the stocks of goods of retail merchants for general purposes such as sponges, paper, water hose, crayons, mop heads, mantles, cloth and raw materials.

19. All items for repair and maintenance of bridges, buildings, water and fuel pumping plants, shown by Exhibit "B", excepting raw materials and those articles commonly carried in retail stocks of goods, are materials especially [fol. 108] designed for or suitable for railroad purposes

but are susceptible of other uses. Steel work, parts for bridges, and bridge timbers are articles especially designed and prepared for the intended purposes and are usually constructed or manufactured according to particular specifications for plaintiff's particular uses, and are not economically susceptible to other than the intended use.

20. Railway stationery, blank forms, time tables, tickets, advertising, instruction books, books of rules and regulations and the like, are especially manufactured and printed for plaintiff's railroad uses and purposes and are unfit for any other uses.

Purchasing and Handling of Property

21. As a matter of practical economy, all purchases made by the plaintiff of property for use in conducting transportation are restricted to the least practical quantities required for current operations, repairs and renewals. All purchases are made on the basis of estimates and requisitions to meet current requirements and such estimates are made by those persons in charge of operations and maintenance throughout the entire railroad system, to wit: Division Superintendents, Division Engineers, Department Heads and their subordinates. Upon such estimates being made and communicated to the management, the managing officers of such railroad give authority for the expenditures for all classes of such property and all purchases made for the Purchasing Department are based on such estimates and the authority for such expenditures.

22. The purchasing department of the railroad is a part of the operating personnel of the railroad and all of the expenses of said department incurred in the purchasing of tangible personal property for railroad operation, maintenance, renewals and repairs are chargeable to railway operating expense.

[fol. 109] 23. The Storekeeper has charge of all railroad storehouses and material yards, and all such railroad storehouses and material yards are parts of railroad operating property and all of the expenses thereof and of the Storekeeper and his department which are incurred in the handling and distribution of tangible personal property for the operation, maintenance, renewal and repair of the railroad operating transportation plant are ultimately charged

to the same accounts in which cost of such materials are included. When carload lots are delivered to plaintiff at points outside of California, the shipment is either consigned to point of use for unloading directly at the job, if for repairs or renewals, or to point of distribution for operations, or made by transfer to work train, to the Store Department, supply cars, or may be unloaded at storehouses or material yards. When unloaded at any such destination, the unloading is performed by railway operating employes and at railway operating expense.

24. The Store Department keeps a record of all property received and distributed by it. Neither the Store Department nor any agent of the railroad receiving such property makes any use thereof, prior to its placement for installation or consumption, for any purpose other than to take custody thereof, make records thereof, sort, unpack or pack, break bulk, prepare, retain, handle or distribute the same and all detention and handling thereof at all times is on railroad operating property and at railroad operating expense.

25. All tangible personal property purchased as aforesaid is handled inbound, from the time the same reaches the rails of the plaintiff, as company material, on company material way bills and on free billing; and all of such property when received by plaintiff as purchaser and thereafter handled by the plaintiff in distribution over its lines of railroad, is likewise handled on free company billing, and the cost of all of such transportation over company rails is a charge [fol. 110] to railway operating expense.

26. At the time of the order and shipment of all tangible personal property involved in this action from the interstate points of origin, plaintiff gave shipping directions specifying destination for the property either at plantiff's points of installation, or at points of use such as terminals, shops, stations, or office buildings, or at points of distribution such as material yards, roundhouses, stations or storehouses. Plaintiff maintains storehouses and storerooms and material yards and other places of storage along all of its lines of railroad at principal terminals, at division points or at stations. Such places for the holding and detention of railway materials and supplies are all a part of a unified distribution system.

Installation of Specific Order Materials, etc.

27. Specific order materials, supplies, etc. are purchased and handled in the following manner:

In order to perform deferred maintenance, to replace parts of main line track which had or was about to reach the end of its service life and in order to make provision for the safe operation of high speed trains, of which the new streamliner passenger trains are an illustration, plaintiff, in the year 1936, commenced the reconstruction of certain parts of its main lines of railroad. The materials described in Exhibit "A" of the bill of complaint are materials which were purchased for the purpose of carrying out plaintiff's track renewal program in the year 1936. The necessity for such renewal program was ascertained prior to the year 1936 by inspection of the track, by experience in the life service of rail and ties and other materials in the railroad track which are subject to wear, and by reason of the determination to improve train schedules and to place in service certain passenger trains known as the streamliner trains to be [fol. 111] operated on faster train schedules.

In accordance with the information so ascertained and the necessity for making such track renewals, the management of the railroad caused an investigation to be made concerning all the necessary track renewals and improvements in roadway for the purposes aforesaid, the necessity for the elimination and improvement of curvature, improvement of grades, the character and specification of the materials required, and required to be made an estimate of the cost of carrying out such program. The information prepared for the carrying out of such program included specific data, including the number of miles of new rail to be laid, the number of ties, frogs, switch points, bridge timbers or other bridge materials, spikes, bolts, nuts, tie plates, and an itemization of other materials which would be required, such information constituting a complete specification of the work to be performed.

Upon receipt of such data, the Department of Maintenance of Way and Purchasing Departments were called upon to estimate the cost of such proposed renewals and the resulting information and estimates, together with the basic data and specific recommendations of the local officials, including the General Manager, were then submitted to the President of plaintiff's railroad, who in turn submitted the entire proposal to plaintiff's Board of Directors. The

Board of Directors approved said program, and in order to carry it into fulfillment the purchasing agent of said railroad was required to secure bids for the purchase of said materials. Upon receiving satisfactory bids, orders were placed for the purchase of said materials at points outside the State of California. The greater part of such materials was manufactured for the express purpose of filling plaintiff's orders therefor and when ready for delivery by the sellers thereof to plaintiff, instructions were given for the transportation of said materials to points on plaintiff's [fol. 112] railroad and over plaintiff's line of railroad to the several places of installation of said materials. Having information as to the dates of shipments and dates of expected arrival of said materials at such places of installation, gangs of workmen, known as "extra gangs" were assigned to the several points of installation in order that the materials would be installed in the railroad track with the utmost economy and dispatch. Said materials, including rails and ties, arrived at points of installation in carload lots and were unloaded from the cars upon the ground along the right of way at points of use and were installed by said extra gangs, all in accordance with the program theretofore made and outlined. The foregoing applies to the tangible personal property specifically described and set forth in Exhibit "A" of the bill of complaint.

As to similar property purchased by plaintiff, since the filing of said complaint and which will hereafter be purchased for use in California, to carry out track renewal programs, the procedure followed by plaintiff has been and will be substantially as follows:

In the fall of each year it is the custom and practice of plaintiff to follow the same procedure as above outlined with regard to any substantial renewal or betterment of its existing facilities. This annual renewal program is based upon estimates and recommendations of local officials and is included in the proposed budget which, if approved by the board of directors, follows the procedure above outlined with regard to the purchase and transportation into California and the installation of materials in California necessary to carry out the annual renewal program approved and authorized by plaintiff's board of directors.

All substantial repairs or renewals of railroad track, equipment, and the more important structures of the plaintiff's railroad transportation plant, insofar as the same deal

[fol. 113] with the purchase, transportation into the State of California, and installation of tangible personal property as a part of plaintiff's railroad facilities, are planned, programmed, authorized and completed in accordance with the hereinbefore described practice.

28. The track materials aforesaid were held or retained by plaintiff after the termination of their shipment to California by such delivery to the place of installation and before their installation in plaintiff's railroad for varying periods of time, the extent of such periods depending upon plaintiff's convenience, the stage of preparation for the installation thereof at the time of the arrival thereof at the point of distribution or installation, or other circumstances incidental to plaintiff's operations. The period of time between the termination of the shipments to California and the installation of the materials was no longer than was required for the convenient and effective installation thereof. The unloading, handling, retention and installation of such track materials were accomplished by railway employees and such installation, when accomplished, constituted a renewal or replacement of a part of the existing railway operating plant and became immediately a part thereof.

29. Materials for replacement or renewals of major structures such as buildings and bridges were and are handled in the same manner as above related, excepting articles required in less than carload lots, which are usually handled in the same manner as materials and supplies for current operations and maintenance.

30. Materials and supplies, equipment, tools or parts which are ordered to fill special requirements are delivered directly to the department making advance requisition therefor, and are not detained or held in any manner except such as is incidental to transportation to the place of installation or that which is incidental to such installation.

[fol. 114] Stand-By Facilities, etc.

31. In the interest of prompt and efficient public service and in the performance and discharge of its obligations to the public as a common carrier by railroad, plaintiff is required and compelled to have supplies and facilities to meet current requirements distributed over its entire line of railroad in quantities and at the times necessary to antici-

pate regular current requirements, and to have such reserves in quantities necessary to meet constantly fluctuating demands and emergencies which result from changes in the volume of business handled, traffic accidents, wrecks, weather conditions, washouts, and unforeseen operating conditions which commonly affect a railroad, and to meet the ordinary wear and tear which occur in connection with the use of its railroad and facilities.

Receipt, Distribution and Maintenance of Stand-By Materials

32. After the termination of the interstate shipment of stand-by materials and facilities, and upon their arrival at their places of destination on plaintiff's lines, the same are unloaded by plaintiff's employees directly to material yards, storehouses, shops, or other places maintained by the plaintiff as a part of its operating facilities for the detention of stand-by materials and supplies and plaintiff retains and holds them at such places as stated in the next paragraph.

33. Plaintiff retains and holds and keeps on hand said stand-by materials and supplies in space provided by it in the State of California at strategic points along its lines of railroad—i. e., at points suitable for prompt distribution of stand-by facilities, materials and supplies as needed—over its entire system of lines.

34. The distribution by plaintiff of stand-by materials and facilities to stores located at the points along its lines [fol. 115] of railroad aforesaid and the holding of such stand-by facilities at such places is necessary to insure the rendition by plaintiff as economically, efficiently and as free from interruption as possible of its interstate and intrastate railway transportation services.

Installation of Stand-By Facilities

35. When repairs become necessary to any part of plaintiff's railroad transportation plant or to any of the equipment or facilities thereof, plaintiff's employes who are charged with making such repairs take out or secure delivery to them from plaintiff's nearest place of detention thereof, such stand-by materials or facilities as are necessary to make such repairs.

When materials and supplies for current renewals, repairs or consumption are received at general stores in carload lots and such carload quantities are required at other points of use along the railroad, some part of such materials may be immediately reconsigned to such points of ultimate use, it being the practice of the plaintiff to distribute, as far as is practicable to do so, stand-by materials, supplies and facilities to most convenient points of distribution and as nearly as possible to the places of ultimate use thereof.

36. Between the time when stand-by facilities or stand-by renewal parts or materials are taken from plaintiff's stores or material yards, as above described, and the time when such articles are available as physically connected parts of plaintiff's railway transportation plant or of the equipment or facilities thereof, for carrying on interstate and intrastate transportation, time intervals occur during which such articles of property are retained or held in the possession of the plaintiff and are not in motion in the course of installation thereof, such time intervals being such as necessarily [fol. 116] occur in the transportation thereof to the places of installation and such as occur when such articles or parts are set down at the places where they are to be physically connected with plaintiff's railway plant or facilities or equipment thereof, and before further movement or handling thereof in the course of actual installation can proceed. After such articles are taken from plaintiff's stores or material yards or other places of detention as above described, there is no retention or holding of any of said facilities, except such as necessarily occurs in the ordinary and efficient course of transporting said facilities to their ultimate destination and installing them as physically connected parts of plaintiff's railway transportation plant or the facilities or equipment thereof.

37. There is no holding in any warehouse, storeroom or other like place of deposit, of any of the specific order property for renewals or replacements hereinbefore described, after the termination of the interstate shipment and the plaintiff's receipt thereof; however, time intervals during which such tangible personal property is retained or held in the possession of the plaintiff, and is not in motion in the course of installation thereof, occur between the time of termination of the inferstate shipment thereof and the time when the installation of such tangible personal property is

completed and the same is available as a physically connected part of plaintiff's railroad transportation plant for carrying foreign, interstate and intrastate transportation and commerce; said intervals being such as occur when such repairs or renewal parts are set down at the places where renewals or replacements are to be made and before further movement or handling thereof in the course of installation can proceed. There is no retention or holding of any said equipment except such as necessarily occurs in the ordinary and efficient course of transporting such tangible personal property to its ultimate destination and installing it as physically connected parts of plaintiff's railroad transportation plant.

[fol. 117] 38. At no time is the property herein referred to a part of a commercial stock in trade which is offered for sale or sold to the general public and plaintiff does not engage in the business of retailing any of the kinds of railway materials and supplies involved in this action and no part thereof is or was purchased or held for any purpose or purposes other than those herein described.

39. When stand-by facilities, materials and supplies are received, plaintiff's accounting department, pursuant to said accounting rules and regulations and uniform system of accounts for railroad common carriers charges the cost thereof to its "materials and supplies" account. Upon taking such supplies from its railway stores or other places of detention for installation as a part of plaintiff's plant, facilities or equipment or for consumption in railway operation, plaintiff credits the cost thereof to its said "materials and supplies" account and charges them to the appropriate account for railway operation or for maintenance of roadway or equipment or other maintenance, or to the appropriate property account, in accordance with the prescribed uniform system of accounts aforesaid.

The cost of handling and the cost of installation of all repair or renewal parts and the cost of handling of all of that class of materials which are consumed in operation are chargeable to operating expense or to operating property accounts and payable out of money devoted to transportation service. Such accounting is applicable to specific order materials and supplies as well as to stand-by materials and supplies.

40. The plaintiff did not change or alter the aforesaid purposes and uses of the tangible personal property involved in this action or its said intentions with regard thereto or divert any of said property to any other uses or purposes, and did not charge the cost of any part thereof [fol. 118] to any business or enterprise other than its railroad transportation business, at the time of the incidence of said tax according to the terms of the statute, or at any time material to the issues here involved, except as hereinafter stated.

41. Notwithstanding any statement hereinbefore made relating to the manner of purchase and use of materials for car repairs and car maintenance, some part of plaintiff's purchases in interstate commerce of materials for car repairs and car maintenance include materials which are used in the following circumstances:

It is the duty of common carriers by railroad to furnish cars for all classes of transportation which they undertake to perform and to provide cars for transportation throughout the United States by interchange with other lines of railroad. The interchange of cars between all lines of railroad is a part of transportation and such cars are inseparably used in both intrastate and interstate transportation. Common carriers by railroad are required by law to permit their freight cars to be interchanged to the rails of all connecting carriers. When cars of one line are on the tracks of another railroad, they are known as "foreign cars". When foreign railway cars are used by the plaintiff, they are hired or rented for such use and a compensation or rental is paid therefor by the plaintiff, while in operation on its line, and the cars so hired are used by the plaintiff as its own when so used. It is the duty of the plaintiff using cars so hired by it, both because of a contracted obligation and because of the unavoidable necessity of keeping cars in safe operating condition, to perform all necessary maintenance and running repairs required by such cars. The contract to perform maintenance and running repairs for cars so rented and used by operating carriers is expressed in the code of rules governing the condition and repair to freight and passenger cars for the interchange of traffic, adopted by the Associa- [fol. 119] tion of American Railroads, which rules are subscribed to by all railroad lines interchanging cars. Rule 1 of this code provides that the railroad is responsible for the condition of all cars on its line, and must give to all.

regardless of responsibility, equal care as to inspection, oiling, packing and running repairs.

All carriers using foreign cars pay to the car-owner per diem charges which are for reimbursement for interest on the investment, depreciation and cost of necessary repairs. When repairs are made to foreign cars by the operating railroad, the charge against the owner for reimbursement of the expense is an offset to the repair factor included in the basis for the per diem charge under which the owner assumes the expense of maintenance.

Cars, whether loaded or empty, having defects in violation of the Safety Appliance Acts, or the regulations of the Interstate Commerce Commission, may not be offered in interchange and cars in an unsafe condition or unsuitable for loading must be repaired on the line where such condition develops or is found to exist. The necessity for running repairs or for repairs necessary to enable the use of the car and its return to owning line, may result from normal wear or the completion of service life of a part which matures while the car is in possession of the operating carrier, or may result from accidental breakage or negligent handling of the car by the carriers making use thereof. In some cases, breakage or damage to the car may be due to a fault of the operating carrier, in which case the cost of repair is an expense properly chargeable to and borne by the operating carrier. The operating carrier making ordinary running repairs, or repairs necessary to enable the car to be safely operated, where damage to the car is not the result of the operating carrier's negligence, bills the owner of the car for actual cost of repairs and is reimbursed for such cost by [fol. 120] the owner of the car. The obligation to make such repairs to foreign line cars while in plaintiff's possession is imposed upon plaintiff by the requirements of the Federal Safety Appliance Acts, the rules and regulations of the Interstate Commerce Commission, the general interchange agreement of the Association of American Railroads and plaintiff's legal duty to the shipping public to function efficiently as a common carrier.

Materials and supplies for foreign car repairs are purchased, accounted for and used in the same manner as like materials purchased for the repair of plaintiff's cars, and railroad operating capital is likewise used for the purchase of such materials, subject to reimbursement by the owner of the car for those repairs chargeable to the owner and not

borne by the operating line. Foreign cars are used by the plaintiff for its purposes in inseparably carrying on intrastate, interstate and foreign commerce in the same manner as its own cars are used, and plaintiff's cars are subject to interchange with all foreign railroads in the same manner as foreign cars are interchanged to plaintiff's line.

42. Exclusive of the purchases of tangible personal property made by plaintiff for its own uses and in addition to the quantities hereinbefore described, upon which defendants claim the right to levy the tax in question, certain purchases of tangible personal property are made by or for plaintiff's subsidiary railroad companies in the following circumstances:

The Northwestern Pacific Railroad Company and the San Diego & Arizona Eastern Railway Company are wholly owned subsidiaries of Southern Pacific Company and, while nominally separate organizations, they are in many respects subject to the common management and control of Southern Pacific Company. Some of the officers and directors are common to all three of said companies. Said subsidiary [fol. 121] companies cooperate closely with the parent company in furtherance of the parent company's transportation business.

Each of these companies is a railroad engaged in the handling inseparably of intrastate, interstate and foreign transportation and commerce, and each of these railroads interchanges all classes of commerce with the Southern Pacific Company. Each of said railroads serves as a feeder line to and from plaintiff's lines of railroad. Each of these railroads reaches ports and points of interchange with carriers handling interstate and foreign commerce. Each of these railroads operates in the performance of transportation services in the same manner as plaintiff's operations are described in this stipulation, excepting as to the physical and geographical location of the lines of railroad.

Each of said lines of railroad has its own separate store department and places of storage and means of distribution of materials and supplies on its own lines, and handles and distributes all tangible personal property used by it in the performance of transportation on its own lines.

The several methods of purchasing tangible personal property for said subsidiary companies are described as follows:

(a) The purchasing agent of each company makes certain purchases respectively in the name of said company, and all such purchases are delivered directly to said company at places on its lines and do not come into the possession of the plaintiff excepting as plaintiff may handle the same as a carrier in the process of transportation and delivery to said company as consignee. The purchases so made do not include any property which is not purchased in carload quantities. Taxes on account of the storage, use or other consumption of the materials described in this paragraph by said subsidiary lines are not sought to be enjoined in this proceeding.

[fol. 122] (b) In addition to property purchased in the manner above described, Southern Pacific Company purchases in its own name for its said subsidiary lines, certain materials to be used respectively by its subsidiary lines, which are purchased in carload lots and delivered respectively to said subsidiary lines in carload lots and said materials do not go into the possession of Southern Pacific Company for any purpose excepting as same may be handled by Southern Pacific Company as carrier thereof in the process of transportation and delivery of the same respectively to said subsidiary lines. Such purchases are originally made by the use of railway operating capital of Southern Pacific Company, which operating capital is reimbursed out of railway operating capital of the subsidiary company for which such purchases are made, and no part of such expenses or cost of such materials and supplies is ever charged to any other industry, business or activity of the plaintiff or of either of said subsidiary companies. Taxes on account of the storage, use or other consumption of the materials described in this paragraph by said subsidiary lines are not sought to be enjoined in this proceeding.

(c) In addition to tangible personal property purchased for said subsidiary companies in the manner hereinbefore described, Southern Pacific Company purchases in interstate commerce certain materials and supplies (hereinafter specified) in limited quantities or in less than carload lots. Such purchases are made in the name of Southern Pacific Company for use by said subsidiaries respectively and are made in the same manner as Southern Pacific Company makes purchases for its own use and Southern Pacific Company is reimbursed for the full cost of making such pur-

chases and handling and delivering the same to said subsidiary companies. Such purchases are originally made by the use of railway operating capital of Southern Pacific Company, which railway operating capital is reimbursed out of railway operating capital of the subsidiary com- [fol. 123] pany for which such purchases are made and no part of such expense or the cost of said materials and supplies is ever charged to any other industry, business or activity of the plaintiff or of either of said subsidiary companies.

The following are all of the items which are specified in the bill of complaint and Exhibit "B" and which are purchased in the manner described in this part (c) above, to-wit:

Air brake parts, steel blooms, bolts and nuts, stay bolts, journal boxes, burners and lamps, car heating parts, car lighting parts, carbide, miscellaneous castings, steel chain, wire cloth, conduit, sheet copper, bell cord, cotters, couplers, seat coverings, retard devices, steel trap doors, electrical parts, feed water heater parts, copper flue ferrules, miscellaneous forgings, plug fuses, gaskets, McBeth glass, dust guards, headlight parts, air brake hose, steam hose, injector parts, boiler insulation, bar iron, flyer iron, stay bolt iron, McLaughlin joints, tail lamps, sash locks, lubricator parts, knuckles, common wire nails, metallic packing, priming paint, pantosote, sheathing paper, taper pins, plates and sheets, porous plugs, bull rings, brass rods, train battery separators, sheet steel, asbestos tape, torches, copper tubing, steel tubing, gate valves, globe valves, pressure valves, lock washers, wrot washers, graphite, driving journal grease, valve oil, colored cotton waste, journal box waste, terminal blocks, dry and condulet cells, channel pins, fibre end posts, battery renewals, copper wire, galvanized wire, iron wire, axes, hack saw blades, chisels, twist drills, files, wheel and coupler gauges, light globe guards, hammers, air tool hose, journal jacks, reamers, riveting hammer parts, saws, tube expanders, tool steel, taps, grinding wheels, wrenches, track drill bits, track chisels, shank drills, ballast forks, track jacks, motor car parts, track picks, cross cut saws, track shovels, spark plugs, measuring tape, car clean- [fol. 124] ing brushes, bunting, signal lamp burners, brake clubs, bell cord, crayons, fuses and torpedoes, lantern

globes, mop heads, water hose, inspectors lanterns, sponges, baggage truck wheels, burlap, brass wire cloth, iron wire cloth, steel cloth, water hose, piling, black iron pipe, pipe fittings, galvanized iron pipe, round point shovels, stringers, washers.

Typical of such items of materials and supplies which are purchased in the name of Southern Pacific Company, for use by said subsidiaries as a purchasing agency respectively for said subsidiary companies, in the manner last described, is air brake hose. Air brake hose is put up in bundles or bales. Estimates for requirements of air brake hose for all three of said companies are respectively made by each of said companies and the estimated requirements for each three months' period are given to the purchasing agent of Southern Pacific Company. Said purchasing agent places the order therefor, purchases being made on single orders and usually for carload quantities. Shipments of such material are made to the store department of Southern Pacific Company and the required number of bundles or bales ordered for Southern Pacific Company is disposed of and handled in the manner hereinbefore described for the handling of Southern Pacific Company's materials and supplies. The remaining number of bundles or bales of air brake hose purchased for each of said subsidiary companies is held by said store department for such time as may be incidental to the reloading and transportation thereof to said subsidiary company. When said air brake hose is transported and delivered to either of said subsidiary companies, it is used in the operation of said railroad as a common carrier of intrastate, interstate and foreign commerce.

For accounting purposes, transfer requisitions are made to cover all such materials purchased for subsidiary companies and charges are made against said subsidiary com-[fol. 125] panies for reimbursement of such cost of materials and purchasing expense. The procedure followed with respect to the handling of air brake hose, as above described, is followed in the handling of all of the tangible personal property hereinbefore itemized. All of said items so purchased for said subsidiary companies are purchased for use in and are actually used in conducting the transportation business of said subsidiary railroad companies in inseparably intermingled intrastate, interstate and foreign commerce.

Only that part of said items which are purchased by Southern Pacific Company for its own separate uses are included in the property on account of which defendants claim use taxes as aforesaid. Taxes on account of the storage, use or other consumption of the materials described in this paragraph by said subsidiary lines are not sought to be enjoined in this proceeding.

43. As an exception to the facts hereinbefore stated, ties out of plaintiff's reserve or stand-by supply of ties, have been sold to Western Pacific Railroad Company in the following circumstances: on occasions when said railroad company has been in urgent need of a small supply of ties and has requested the same of plaintiff, plaintiff has sold to Western Pacific Railroad Company, such small amount of ties as would not materially diminish its reserve supply thereof. Such sales have not at any time amounted to in excess of one-tenth of one per cent of plaintiff's regular reserve supply of ties. Upon such a sale being made, a sufficient quantity of ties is included in plaintiff's next purchase of ties to make up such depletion of its reserve supply. An accommodation of this character is only made in some exceptional emergency and such sales are of extremely rare occurrence. Similar sales of some other material or repair part may have been made to some railroad company other than plaintiff's subsidiary railroads in some exceptional emergency.

44. By reason of its inextricably intermingled interstate, [fol. 126] foreign and intrastate commerce and business, plaintiff is compelled to purchase from points outside of California and to use and consume a greater amount of tangible personal property than it would be required to purchase if it were engaged only in intrastate railroad transportation business.

45. Notwithstanding that none of the property aforesaid was, is or will be used exclusively and separately by the plaintiff in conducting intrastate transportation business, but that all of it is used as hereinbefore stated, defendants have demanded of the plaintiff the taxes aforesaid under the provisions of Ruling No. 11 of the defendant, said State Board of Equalization, promulgated on or about February 6, 1936, which said ruling is as follows:

"The fact that tangible personal property is purchased in interstate or foreign commerce does not exempt from the tax the storage, use or other consumption of such property in this State after the shipment of the property in interstate or foreign commerce has ended.

"The fact that tangible personal property is used in this State in interstate or foreign commerce following its storage in this State does not exempt the storage of the property from the tax. The tax does not apply to the use or storage of property purchased for use in interstate or foreign commerce and actually placed in use in interstate or foreign commerce prior to its entry into this State."

46. It is understood that in making this stipulation of evidential facts, defendants do not stipulate as an ultimate fact that the materials involved herein were in interstate use in plaintiff's railroad operation in conducting transportation prior to their physical installation in plaintiff's railroad and/or consumption in conducting transportation, it being expressly understood that the time when interstate [fols. 127-129] use commenced is a matter of ultimate fact or mixed conclusion of law and fact to be made by the court.

It is further understood by and between the parties hereto that this stipulation is a stipulation of facts only, and that neither party hereto is stipulating to conclusions of law, and that both parties hereto are entitled to draw such inferences from the facts herein stipulated, or such conclusions of law, as they may be so advised.

Dated: December 20th, 1937.

Guy V. Shoup, Harry H. McElroy, Attorneys for Plaintiff. U. S. Webb, Attorney General; H. H. Linney, Deputy, by James J. Arditto, Deputy Attorney General, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 130] In United States District Court, Northern District of California

In Equity. No. 4055-R

Southern Pacific Company, a Corporation, Plaintiff,

v.

John D. Corbett, Fred E. Stewart, Richard E. Collins, Ray L. Edgar, and Harry B. Riley, as Members of the State Board of Equalization of the State of California; State Board of Equalization of the State of California, and U. S. Webb, the Attorney General of the State of California, Defendants

Before Denman, Circuit Judge, and St. Sure and Roche, District Judges

Opinion—Filed May 3, 1938

Denman, Circuit Judge:

This case has been submitted under an agreed statement of facts which sustains the pertinent allegations of the bill discussed in our opinion denying the motion for its dismissal. 20 Fed. Supp. 940. The railway has established [fol. 131] that the storage use of the railway materials, solely for its current repairs and renewals and necessary extensions of its intermingled interstate and intrastate enterprise and plant, and without which usage the railways would stop running, is a use in interstate commerce. Hence a tax upon such use is a tax affecting an interstate commerce use—that is, affecting the federal as distinguished from any state function performed by the railway as a public carrier. At the hearing we invited further argument and briefing, but the able presentation on behalf of the State has not answered the question, "In what enterprise other than the intercommingled interstate and intrastate railroading is this use in storage for current repairs and replacements, without which the railroad could not operate?" Such storage use for current installation is use in interstate commerce in any realistic sense understood by industrialists and merchants, (20 Fed. Supp. 943), and could be regarded otherwise only by the application of some "artificial standard" prohibited by Gregg Dyeing Co. v. Query, 286 U. S. 472, 480.

However, since our denial of the motion to dismiss, the Supreme Court has decided three cases dealing with the boundaries of state and federal taxation. Two of them, Western Live Stock v. Bureau of Revenue, 82 L. ed. 548, and Coverdale v. Arkansas & Louisiana Pipe Line Co., decided April 4, 1938, significantly expand the area of the states. A third, Helvering v. Mountain Producers Corp., 82 L. ed. 607, explicitly overrules long established concepts determining the respective taxing areas of both governments.
[fol. 132] It is suggested by the state's officers that since the thirteenth paragraph of that decision states:

"* * * In the light of the expanding needs of the State and Nation, the inquiry has been pressed whether this conclusion has adequate basis; whether in a case where the tax is not laid upon the leases as such, or upon the government's property or interest, but is imposed upon the gains of the lessee, like that laid upon others engaged in similar business enterprises, there is in truth such a direct and substantial interference with the performance of the government's obligation as to require immunity for the lessee's income."

Helvering v. Mountain Producers Corporation, 82 L. ed. 607, 611,

we may be required to reconsider our decision with a view to the expanding needs for revenue of the State of California, and they offer the enactment of the use tax itself as evidence of such need.

In the present emergency of dependent unemployed, California's need for revenue is of sufficient pressure to produce incandescence, but the emitted light does not show where the path of such a principle of determination will lead us.

What light we have on various interstate railways, performing a National public service as important in the body politic as the circulation of blood in the individual, seems to disclose correspondingly "expanding needs" for revenue to meet their expanding payrolls and interest on debt and, here, expanding taxes. Indeed, so pressing are their needs that only by the expanding use of federal funds is their federally regulated function prevented from transfer to federal courts and federal receivers. Already, for many [fol. 133] railways, it has been transferred.

We cannot believe that the language of the Mountain Producers case must be interpreted as imposing on us, first, a determination of the need for state taxation, and, if found, second, a reconsideration of our decision on the denial of the motion to dismiss with a view to a reversal of our holding there. Such a criterion would suggest another review and other overrulings if returning prosperity contracts rather than expands the state's need.

We prefer the alternative view of the state's brief that, just as the emergency of the depression and high rentals in the so-called Rent Cases, Block v. Hirsh, 256 U. S. 135; Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, and Edgar A. Levy Leasing Co. v. Siegel, 258 U. S. 242, and also in the much later case of Home Building and Loan Asso. v. Blaisdell, 290 U. S. 398, induced the Congress and the Judiciary to the exploration of hitherto unused constitutional powers, so now the urgency of the more recently expanding functions of government in aid of the economic and social needs of the average man, also made poignantly clear by the world depression, requires both legislatures and courts to review the border line between state and federal taxing areas, as that was decided in cases when no such economic and social conditions existed or had been exposed.

Prior decisions considered in the overrulings by the Mountain Producers case present a more definite guide for determining its effect on the decision of this case. Among the cases considered is Indian Oil Co. v. Oklahoma, 240 U. S. [fol. 134] 522, holding invalid as an unconstitutional burden on a governmental function a tax on Indian land leases owned by the taxpayer. Here the tax was on the property itself of the taxpayer.

In three other cases, the income of the taxpayer from his leases is held not taxable. In Choctaw & Gulf R. R. v. Harrison, 253 U. S. 292, was held invalid a state tax on the lessee of a mine from the trustee of the mine for Choctaw and Chickasaw Indian tribes, wards of the federal government, based upon his gross sales of his coal. The court held that the lessee was "the instrumentality through which this (governmental) obligation is carried into effect". Such an agency cannot be subjected to an occupation or privilege tax by a state".

In Gillespie v. Oklahoma, 257 U. S. 501, the state tax on the income of leases owned by the taxpayer was held in-

valid on the same reasoning, as was the federal tax on the income of the owner of state leases in Burnet v. Coronado Oil & Gas Co., 285 U. S. 393.

In all these cases the tax on the taxpayer's property or his income incidental to its ownership is regarded as potentially destructive of the governmental function served by the taxpayer in the exercise of its ownership.

In the Mountain Producers case the tax was upon the income from the leases, and the court states the overruling principle to be:

"* * * And where it merely appears that one operating under a government contract or lease is subjected to a tax with respect to his profits on the same basis as others who are engaged in similar businesses, there is no sufficient [fol. 135] ground for holding that the effect upon the government is other than indirect and remote. We are convinced that the rulings in Gillespie v. Oklahoma, 257 U. S. 501, 66 L. ed. 338, 42 S. Ct. 171, supra, and Burnet v. Coronado Oil & Gas Co. 285 U. S. 393, 76 L. ed. 815, 52 S. Ct. 443, supra, are out of harmony with correct principle and accordingly they should be, and they now are, overruled."

Helvering v. Mountain Producers, supra, 613.

However, preceding this sentence regarding taxation on such income is another stating the broader principle permitting taxation on property of private persons, formerly regarded as having the character of governmental agents because of their leases or contracts with the government. This statement is so significantly joined by the word "and" to the succeeding above quoted sentence, that we are constrained to believe it to be the broader ratio decidendi of the case. The preceding sentence is (pp. 612, 613):

"These decisions in a variety of applications enforce what we deem to be the controlling view—that immunity from non-discriminatory taxation sought by a private person for *his property* or gains because he is engaged in operations under a government contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of government. Regard must be had to substance and direct effect." (Emphasis supplied.)

If, then, the private person dealing with the federal government with reference to his property is subject to state

taxation, an occupation tax on that person in the use of his property would seem equally valid.

If this be so, the principle established is inconsistent with that controlling in Graves v. Texas Co., 298 U. S. 393, 401, cited by the Railway as controlling here. There a con- [fol. 136] tractor agreed to sell gasoline to the government. It was his property until delivery to the government. Prior to delivery it had to be stored and withdrawn from storage. He was taxed by the state of Alabama for this use of storage and withdrawal while still his property.

The court in the Graves case states that this tax increases the government's cost by the amount of the tax levy. However, it seems clear that because the increased cost is so measurable, the principle is no different from the sales tax on the coal in the Choctaw case. It is just as certain that the government will receive less for the coal lease as that it will pay more for the gasoline. One is no more direct than the other. Both are levied on the owners of gasoline and coal while the government has no title in either.

Shortly before the Mountain Producers decision was that in Western Live Stock v. Bureau of Revenue, 82 L. ed. 548. There a non-discriminatory tax on gross receipts from the sale of advertising in a periodical printed in one state and circulated in that and in other states is held valid as on an intrastate activity. The fact that it increases the cost of producing advertising, which has its value because of its interstate circulation, is not controlling.

The latest of these tax cases, decided April 4, 1938, follows normally the trend of these decisions. In Coverdale v. Arkansas & Louisiana Pipe Line Co., the party taxed was engaged in the interstate delivery of petroleum gas through a pipe line. It maintained several pumps in the state of [fol. 137] Louisiana, the power from which traveled interstate with the gas it moved. The state levied an occupation tax on the use of the pumps, measured by the amount of power going into an intermingled intra and interstate distribution. The court held that because (1) the tax was non-discriminatory and (2) the pump itself was stationary within the state and itself did not move with the power it created, the tax on its use did not have a direct effect on interstate commerce and hence was a valid exercise of the state's right to tax.

When California's use tax on the Railroad is considered

in connection with the principles established in the preceding cases, we are compelled to the conclusion that the reasoning on which we distinguished it from the cases of Nashville etc. Ry. v. Wallace, 288 U. S. 249, and Edelman v. Boeing Air Transport Co., 289 U. S. 249, is not controlling. It is true that the standby material here stored for the necessary maintenance of a great interstate railway is dedicated to an interstate use, but so are the pumps in the Coverdale case. Railways could not run unless their spare parts and maintenance supplies were used in the storage from which they were currently drawn, but neither could the gas and oil be driven in interstate commerce unless the owner used the pumps.

For the purposes of this case the dividing line is the same as in the Nashville and Edelman cases, even though in those cases there was no proof that the fuel was dedicated to an exclusive use to create power in interstate transportation. It is that the storage use and withdrawal use are prior to the actual installation of the parts and rails in the locomo- [fol. 138] tive and cars and in the roadbed. Until then the increased cost, although it is paid by the passengers and freight owners, is an "*indirect*" burden on interstate commerce. Did not the Coverdale case seek to distinguish between the Nashville and Edelman cases and Holson v. Kentucky, 279 U. S. 345, we should be inclined to hold that the latter case was overruled and, though a direct burden, the tax was as valid as the direct ad valorem tax on the railroad's property itself. In logic, as pointed out by Mr. Justice Stone in his concurrence in the Helson case, the one is as justifiable a method of collecting from the railway what it owes the state government for its services in state governmental protection, as is the other.

We find the facts to be as stipulated and agreed by the parties. From those facts we conclude that the threatened enforcement of the California Use Tax Act will not impose a direct or undue burden on plaintiff's interstate commerce business.

The permanent injunction is denied and the bill dismissed.

William Denman, United States Circuit Judge.
Michael J. Roche, United States District Judge.
A. F. St. Sure, United States District Judge.

May 3, 1938.

[File endorsement omitted.]

[fol. 139] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY DEFENDANTS—Filed June 6, 1938

This case came on for hearing on defendants' motion to dismiss the bill of complaint and to dissolve the interlocutory injunction issued herein, and on plaintiff's application for a permanent injunction. Notice of hearing of plaintiff's application for a permanent injunction was duly given in [fol. 140] accordance with section 266 of the Judicial Code (United States Code, Title 28, sec. 380). The plaintiff appeared by its counsel, Harry H. McElroy and Guy V. Shoup, Esq., and defendants appeared by U. S. Webb, Attorney General of the State of California, by H. H. Linney and James J. Arditto, Deputies Attorney General. The court having heard the parties and their counsel, and having considered plaintiff's verified bill of complaint and defendants' answer and motion to dismiss the bill of complaint and to dissolve the interlocutory injunction and plaintiff's application for a permanent injunction, and having rendered its opinion that plaintiff's application for a permanent injunction should be denied and the bill of complaint dismissed, makes the following findings of fact and conclusions of law, which constitute the grounds of its order denying to plaintiff a permanent injunction herein and dismissing the bill of complaint, as follows:

Findings of Fact

The Court makes the following findings of fact from the allegations of the bill of complaint which are expressly admitted by the answer and proceedings substituting defendants:

1. Plaintiff is, and at all times hereinafter mentioned has been, a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky, and a citizen and a resident of said State of Kentucky. Plaintiff now is, and at all times herein mentioned has been, engaged in the operation, as a common carrier in interstate commerce, of lines of railroad, situated in the States of Oregon, California, Nevada, Utah, Arizona, Texas and New Mexico, and in the transportation of passengers and property from, to and

between points in each and all of said states, and at all times herein mentioned plaintiff, as such interstate common carrier by railroad, has been and now is subject to the provisions of the Act of Congress, approved February 4, 1887, [fol. 141] and acts amendatory thereof and supplementary thereto, known as the Interstate Commerce Act.

2. At the time of the commencement of this action the defendants John C. Corbett, Fred E. Stewart, Richard E. Collins, Ray L. Edgar and Ray L. Riley, were citizens and residents of the State of California, and said persons constituted the State Board of Equalization of the State of California at the time of the filing of this action. The defendant Harry B. Riley has been duly substituted herein in place of defendant Ray L. Riley, and the defendant William G. Bonelli has been duly substituted as a defendant in place of Ray L. Edgar, by orders of this Court, and each of said substituted defendants is a resident of the State of California and now a duly qualified and acting member of the State Board of Equalization of the State of California, and the appearance of each of said defendants has been duly entered herein.

3. At all times pertinent to this action the defendant, State Board of Equalization of the State of California, was and now is, an official board, organized and existing under and by virtue of the constitution and laws of the State of California, consisting of the persons named and described in the foregoing paragraph.

4. The defendant, U. S. Webb, is a citizen and resident of the State of California, residing in the City of San Francisco, and is the duly elected, qualified and acting Attorney General of the State of California and was so acting at all times pertinent to this action.

5. The tax complained of in this case is provided for in an act of the State of California entitled:

"An act imposing an excise tax on the storage, use or other consumption in this State of tangible personal property, providing for the registration of retailers, providing for the levying, assessing, collecting, paying and disposing of such [fol. 142] tax, making an appropriation for the administration hereof, prescribing penalties for violations of the provisions hereof and providing that this act shall take effect immediately."

Said Act, Chapter 361 Statutes of 1935, was approved by the Governor of the State of California, June 25, 1935, and at all times pertinent to the issues in this case has been in full force and effect. The copy attached to the bill of complaint is a true copy thereof.

6. The only remedial procedure prescribed and permitted by said Act at the time of the commencement of this action for the recovery of taxes paid or which may be paid by the plaintiff under said Act, was to make payment of such taxes under protest and bring an action for the recovery thereof within a short period of limitation, to wit: 60 days following the payment thereof, against the State Treasurer of the State of California, in a court of competent jurisdiction in the County of Sacramento, for the recovery of the amount of taxes paid under protest: that a court of competent jurisdiction in the County of Sacramento is a state court of competent jurisdiction, being the Superior Court of said county; that such provision of the Act is not intended to provide for an action in a federal court.

7. The damages and injury which plaintiff would sustain by reason of said statute if the enforcement thereof in the particulars complained of be not restrained (in the event the imposition of the tax complained of is held to be unconstitutional) are and would be great and irreparable, and the enforcement of collection of the taxes involved herein and claimed to be due from the plaintiff, and which would become due according to the terms of said statute, and the interpretations thereof by the defendants, and the claims for taxes asserted by said defendants against the plaintiff, would continue to run to large amounts and impose upon the plaintiff much accounting work and expense in connection with making returns and payments of said taxes; and by reason [fol. 143] of penalty provisions of the said taxing act plaintiff cannot safely disregard the same and await suits for the collection of said taxes for the purpose of testing the validity thereof because large amounts of penalities would accrue and continue to accrue if such course were followed; and the purported remedy prescribed by said taxing act of payment of taxes under protest and suit to recover the same, being the only remedy allowed to the plaintiff under the terms of said act, would not and does not provide a prompt, speedy and adequate remedy at law because the purported remedy prescribed and directed in said statute

is not a plain and certain remedy, is not a prompt and complete remedy, would not result in compensating plaintiff in full for all of the damages, losses and expenses which would be suffered by it, and would result in a multiplicity of actions.

8. Plaintiff's main lines of railroad extend from San Francisco, California, to Portland, Oregon; from San Francisco, California, to Ogden, Utah, and also from San Francisco, southeast to Los Angeles, California, and thence via Yuma and Tucson, Arizona, to El Paso, Texas, and thence to Tucumcari, New Mexico. At each of said points as well as at numerous other points, plaintiff's lines connect with the lines of other interstate carriers and thus enter into and become a part of through routes of transportation of freight and passengers between all points of the United States, and to and from adjacent foreign countries. In addition to said main lines the plaintiff's transportation system consists of numerous branch lines extending therefrom. The miles of road operated at the close of the year 1935, as reported to the Interstate Commerce Commission in Southern Pacific Company Annual Report, Table 412, was: total mileage (single track) Pacific Lines, 8783.45 miles, and for the State of California, 4,361.88 miles. The gross operating revenue of the Southern Pacific Company (Pacific Lines) for the year ended December 31, 1935, was $124,040,113.00, and that [fol. 144] part thereof applicable to the State of California was $63,508,423.00. At the time complaint was filed, the said figures were the last available for a full year of operation. The gross operating revenue aforesaid applicable to the State of California which was applicable respectively to interstate and intrastate operations, so far as the same could be allocated, and as reported by the plaintiff to the Railroad Commission of the State of California, was as follows: intrastate commerce, $26,926,287.00; interstate commerce, $34,-988,335.00. The seat of general management in the operation of said railroad is located at the City of San Francisco in California, and large quantities of materials and supplies and the aforesaid items of property are purchased for use in the conduct of its business as a carrier within the State of California and elsewhere. Some of the materials and supplies and other articles of tangible personal property aforesaid are used in connection with certain overhead operations carried on and performed within the State of California for

the benefit, and in connection with, the operations of the entire interstate railroad system so operated by the plaintiff because of the fact that general offices for the entire system are located within the State of California and certain general repair and maintenance shops and purchasing agents and stores for the purchase and distribution of supplies are located and operated for the use of said entire railway system at places within the State of California.

9. Under said Act, said defendants and each of them claim that there is due and payable by said plaintiff, taxes on all plaintiff's purchases of tangible personal property specifically described in plaintiff's Exhibits "A" and "B" of the Bill of Complaint, and subsequent purchases, and have demanded payment thereof, and if the plaintiff should fail or refuse to pay such taxes so demanded, said defendants [fol. 145] and each of them, intend and directly and expressly threaten and have threatened to, and unless restrained by the judgment or order of this court will, in pursuance of their said expressed intention, institute and cause to be instituted summary suits or other proceedings to compel the said payment of said tax, interest and penalties provided by said Act.

Defendants, and each of them, further threaten and have threatened in accordance with the procedure laid down in said Act, to cause summary process to be issued for the seizure and sale of personal property of plaintiff used by plaintiff as instrumentalities of interstate commerce in the necessary operation, maintenance and repair of said railroad, and thereby plaintiff's said business will be interfered with and the operation of its railroad will be interfered with to its great and irreparable damage in the sum of more than $40,000, and for which plaintiff has no adequate remedy at law; and defendants and each of them threaten to and will bring repeated suits against plaintiff for further quarterly installments of said tax and subject plaintiff to a multiplicity of suits and harassing litigation to plaintiff's great and irreparable damage.

10. The payment of said taxes would have required plaintiff to pay to the State Board of Equalization on or before July 15, 1936, the several large amounts of tax payment hereinbefore stated and to make additional payments on subsequent purchases, and to suffer the loss of use of such money and the earning value thereof until recovered by suit, if recoverable at all, and in order to comply with the require-

ments of the said taxing act and the demands of said defendants it would be or have been necessary for the plaintiff to incur substantial expenses in tax accounting and in keeping records of information concerning its purchases and the uses of such properties necessary to defend its rights against the imposition of such taxes and that it will be [fol. 146] necessary to continue such accounting unless it is relieved from the necessity so to do and to pay such taxes by the injunction sought in this proceeding, and such expenses and the damages aforesaid, if so incurred, would constitute a substantial and irreparable loss to the plaintiff.

In addition to the findings of fact based on the allegations of the bill of complaint which are expressly admitted by the answer, the Court makes the following findings of fact from the facts stipulated by the plaintiff and defendants:

Plaintiff's Railroad Operations

11. Whenever plaintiff's "railroad" or "railroad transportation plant" or "railroad operations" are hereinafter referred to in these findings, the same shall refer to and mean the plaintiff's railroad plant, facilities or railroad operations inseparably devoted to the service of intrastate, interstate and foreign transportation. Whenever the term "conducting transportation" is hereinafter used, it shall refer to conducting transportation inseparably in intrastate, interstate and foreign commerce. Hereafter the use of the present tense indicates a continuous course of action during all of the time material to the issues in this action.

12. Plaintiff's interstate and intrastate railroad system, described in the complaint, is inseparably and inextricably devoted to the services of intrastate, interstate and foreign transportation and commerce, the same rails, the same facilities, and the same organization being devoted to and used inseparably in plaintiff's said transportation enterprise. All branch lines of railroad forming a part of plaintiff's transportation plant within the State of California carry interstate transportation as well as intrastate transportation, and every part of said railway transportation plant is subject to interstate and foreign uses as well as intrastate [fol. 147] uses. The branch lines of railroad are feeder and distribution lines appurtenant to the main interstate lines and are an essential and useful part of plaintiff's railroad

plant in the handling of interstate and foreign commerce as well as intrastate commerce.

Purchases of Property by Plaintiff

13. In the necessary operation, maintenance and repair of plaintiff's railway transportation plant and the facilities and equipment thereof, plaintiff purchases large amounts of tangible personal property consisting of equipment, facilities, materials, supplies, shop machinery, tools, printed matter and publications, which property is described in the bill of complaint herein and in Exhibits "A" and "B" thereof, in accordance with the purposes, plans and methods hereinafter described, and in accordance with the purpose of doing and performing all of the acts and things with respect to said property, including holding and retention thereof in the State of California, which are hereinafter described. All of said purchases and the purchases hereafter to be made, which are pertinent to the issues of this case, were or will be purchases made in states other than California or in foreign countries and transported in foreign or interstate commerce into the State of California, for the uses and purposes hereinafter described. The tangible personal property described in the complaint represents typical classes of property purchased as hereinafter related, by plaintiff for its railway transportation purposes.

14. The total purchases of tangible personal property involved in this action and the taxes claimed to be due from the plaintiff on account thereof for each quarter to and in- [fol. 148] cluding the quarter ending September 30, 1937, are as follows:

Quarter Ending	Total Price of Tangible Personal Property	Tax Claimed To Be Due
June 30, 1936	$1,590,190.62	$47,705.72
Sept. 30, 1936	1,258,022.74	37,740.68
Dec. 31, 1936	1,429,470.82	42,884.12
Mar. 31, 1937	1,989,206.12	59,676.18
June 30, 1937	1,798,360.97	53,950.83
Sept. 30, 1937	1,861,558.70	55,846.76

Accounting

15. The purchases of all property for the operation, maintenance and repair of plaintiff's railroad were and are

made by the plaintiff through the use of its operating capital consisting of money or current assets definitely devoted to the service of transportation, or through the credit of said plaintiff as a railroad engaged in the service of transportation and upon the purchase of said materials and the payment therefor, the expenses therefor were and are in due course charged into the operating expenses of said carrier to the appropriate accounts for operation, maintenance or repairs, according to the accounting rules and regulations [fol. 149] prescribed for railroads engaged in interstate commerce under the provisions and requirements of the Interstate Commerce Act.

16. Southern Pacific Company, as a railroad common carrier engaged in interstate commerce, is and was subject to valuation by the Interstate Commerce Commission under the Interstate Commerce Act and its valuation for rate making purposes was made by the Interstate Commerce Commission and said valuation is duly reported in Volume 45 of Interstate Commerce Commission Valuation reports, Page 1 (Decided June 10, 1933). The working capital allowed by the Interstate Commerce Commission in plaintiff's said valuation, as of the dates of basic valuation of each property included therein, as shown by said valuation report, amounted to the total sum of $19,022,626.00. The amount of working capital allowed in said valuation was segregated as follows:

Account 708—Cash	$ 5,277,896.00
Account 716—Material and supplies	13,744,730.00
	$19,022,626.00

The amounts carried in accounts 708 and 716 in the company's balance sheets as of the dates of basic valuation and June 30, 1936, are as follows:

	As of Date of Basic Valuation	As of June 30, 1936
Acct. 708—Cash	$14,667,978.87	$15,525,583.40
Acct. 716—Material and Supplies	12,772,970.43	12,235,373.48
	$27,440,949.30	$27,760,956.88

The sum of $27,760,956.88, the amount of working capital as of June 30, 1936, is the approximate amount of working capital devoted to the service of transportation by the [fol. 150] plaintiff at the times pertinent to this action.

17. The accounting which is performed in connection with the purchase and distribution of materials and supplies used for the maintenance, repair and operation of the plaintiff's railroad, under accounting rules prescribed by the Interstate Commerce Commission, is in brief as follows:

Audited vouchers issued in payment of material and supplies purchased are charged to account 716—Material and Supplies, and are concurrently credited to account 760—Audited Accounts and wages payable.

When audited vouchers issued in payment for material and supplies are cashed by payees, the amount thereof is charged to account 760-Audited accounts and wages payable, and concurrently credited to account 708-Cash.

As material and supplies are issued for use in the maintenance and operation of the railroad, the value thereof is charged to account 531-Railway Operating Expenses (separately to each primary account applicable) and concurrently credited to account 716-Material and Supplies.

The uncashed audited vouchers outstanding (with exceptions not material here) remain in account 760 until paid and the debit balance in account 716 represents the amount of unapplied material and supplies remaining on hand.

18. Railroad materials and supplies are classified under the uniform classification of accounts for steam railroads prescribed by the Interstate Commerce Commission in accordance with section 20 of the Act to Regulate Commerce as "Material and Supplies" in Account No. 716, which reads as follows:

[fol. 151] "716. Material and Supplies

This account shall include in the balances representing the cost, less depreciation, if any, of all unapplied material, such as road and shop material, articles in process of manufacture by the accounting company, fuel, stationery, and dining car and other supplies. In determining the cost of material and supplies suitable allowances shall be made for any discounts allowed in the purchase thereof.

NOTE.—Balances representing the cost of unapplied construction material and supplies located at the point of use,

which have been purchased for projected new roads and extensions, are provided for in road and equipment account No. 47. 'Unapplied construction material and supplies' ".

"Unapplied material" means material purchased for specific intended use in the operation, maintenance and repair of the railroad and is carried in said Account 716 until actually placed or used for said purposes, and when actually placed and used said material is included in one of the accounts representing a disbursed expense.

The purchase price of property heretofore described was and is paid from working capital held as cash in banks for payment of current accounts and indebtedness incurred in the operation, maintenance and repair of the railroad and is known as Account 708 Cash, which reads as follows:

"708. Cash

This account shall include money, checks, sight drafts, and sight bills of exchange in the hands of the accounting company's financial officers and agents, or in transit from its agents and conductors for which such agents and conductors have received credit. It shall also include deposits with banks and trust companies subject to check."

All current expenses, including disbursements for the purchase of said materials and supplies are paid from said cash account 708.

Said working capital is necessary in the operation, maintenance and repair of the operating property of the said plaintiff.

[fol. 152] 19. Materials and supplies and working capital are classed in railway accounting practices, as prescribed by the Interstate Commerce Commission, as operative property, and the said working capital and materials and supplies carried in said accounts are and were at the times stated in the complaint a part of the operating property of the Southern Pacific Company. Additions and betterments to existing railway operating transportation plant are chargeable to the appropriate property accounts. Immediately upon the purchase of tangible personal property for railroad operation, maintenance and repairs of existing transportation plant, the same becomes and is subject to accounting in the manner and form hereinbefore described.

20. Taxes charged on account of the alleged storage, use or other consumption of the tangible personal property aforesaid under the California Use Tax Act of 1935, if required to be paid, would be a charge to and become a cost of conducting transportation in the same manner as other taxes against plaintiff's operating property are chargeable.

General Classes of Property Involved

21. The tangible personal property involved in this action is of two general classes: (a) property purchased to carry out a renewal or replacement of track, equipment, facilities, or structures in the existing transportation plant, which is also referred to as property purchased on specific orders; and (b) materials for current maintenance, or for use or consumption in conducting current operations, including stand-by materials. Both of these classes of materials are subject to a further classification as (a) materials [fol. 153] especially designed and manufactured upon approved specifications for railroad uses, (b) railroad materials manufactured upon plaintiff's particular specifications to meet its particular needs and purposes, and (c) general commercial materials.

22. The materials described as track materials, enumerated in plaintiff's Exhibit "A" (of complaint) are all materials especially designed for railroad uses and built according to approved specifications for such uses and are not practically adapted to any other uses. Some of such materials were especially manufactured to supply orders made by the plaintiff and to meet particular specifications as to quantities, quality, sizes and other characteristics defined in plaintiff's orders for such materials.

23. All property described as materials for maintenance of freight, passenger cars, locomotive and work equipment, shown by said Exhibit "B", is materials especially designed and constructed for railroad uses and purposes such as air brakes parts, crane parts, axles, bolts and nuts, booster parts, journal boxes, brakes, car wheels, burners and lamps, car heating parts, car lighting parts, miscellaneous castings, steel chain, cotters, couplers, cylinder parts, retard devices, steel trap doors, miscellaneous forgings, headlight parts, airbrake hose, steam hose, lubricator parts, boiler insulation, stay bolts, trail lamps, knuckles,

and all interchangeable parts for the repair of rolling stock and motive power and generally all parts for the repair of rolling stock, motive power, equipment, shop machinery and shop tools, excepting raw materials such as metal, cloth, wire, paper, glass, lumber, common wire nails, paint, oils, etc.

24. All of the materials described in Exhibit "B" as lubricants and waste for locomotives and cars such as graphite, driving journal grease, valve oil, locomotive and [fol. 154] journal box waste, are materials especially prepared for railroad purposes and uses. Such materials are manufactured to meet the common railroad specifications for such purposes.

25. All items of materials as shown by Exhibit "B" for maintenance of signal, telephone and power lines, are materials primarily manufactured for such uses and purposes. The materials, other than lines, for the maintenance of railway signal systems are especially designed for railroad uses and such materials are generally unfit for any other purposes.

26. Materials for maintenance and replacement of railway shop machinery and tools shown by Exhibit "B" are materials especially designed for such uses, but are suseptible of other uses. All repair parts for existing machinery are supplied upon particular specifications for usé in the repair of a particular article of machinery and such repair parts are generally unfit for other purposes.

27. All items described as track and roadway tools shown by Exhibit "B" are articles especially constructed on specifications for railroad uses, but are susceptible of other uses, and excepting common saws, picks, shovels and other common tools usually carried in mercantile stocks for general uses.

28. A considerable part of the items described as train, station, and yard supplies, shown by Exhibit "B", are especially designed for railroad uses but are susceptible of other uses. The exceptions are those items commonly carried in the stocks of goods of retail merchants for general purposes such as sponges, paper, water hose, crayons, mop heads, mantle, cloth and raw materials.

29. All items for repair and maintenance of bridges, buildings, water and fuel pumping plants, shown by Ex- [fol. 155] hibit "B", excepting raw materials and those articles commonly carried in retail stocks of goods, are materials especially designed for or suitable for railroad purposes but are susceptible of other uses. Steel work, parts for bridges, and bridge timbers are articles especially designed and prepared for the intended purposes and are usually constructed or manufactured according to particular specifications for plaintiff's particular uses, and are not economically susceptible to other than the intended use.

30. Railway stationery, blank forms, time tables, tickets, advertising, instruction books, books of rules and regulations and the like are especially manufactured and printed for plaintiff's railroad uses and purposes and are unfit for any other uses.

Purchasing and Handling of Property

31. As a matter of practical economy, all purchases made by the plaintiff of property for use in conducting transportation are restricted to the least practical quantities required for current operations, repairs and renewals. All purchases are made on the basis of estimates and requisitions to meet current requirements and such estimates are made by those persons in charge of operations and maintenance throughout the entire railroad system, to wit: Division Superintendents, Division Engineers, Department Heads and their subordinates. Upon such estimates being made and communicated to the management, the managing officers of such railroad give authority for the expenditures for all classes of such property and all purchases made for the Purchasing Department are based on such estimates and the authority for such expenditures.

32. The purchasing department of the railroad is a part of the operating personnel of the railroad and all of the [fol. 156] expenses of said department incurred in the purchasing of tangible personal property for railroad operations, maintenance, renewals and repairs are chargeable to railway operating expense.

33. The Storekeeper has charge of all railroad storehouses and material yards, and all such railroad storehouses and material yards are parts of railroad operating property

and all of the expenses thereof and of the Storekeeper and his department which are incurred in the handling and distribution of tangible personal property for the operation, maintenance, renewal and repair of the railroad operating transportation plant are ultimately charged to the same accounts in which cost of such materials are included. When carload lots are delivered to plaintiff at points outside of California, the shipment is either consigned to point of use for unloading directly at the job, if for repairs or renewals, or to point of distribution for operations, or made by transfer to work train, to the Store Department, supply cars, or may be unloaded at storehouses or material yards. When unloaded at any such destination, the unloading is performed by railway operating employes and at railway operating expense.

34. The Store Department keeps a record of all property received and distributed by it. Neither the Store Department nor any agent of the railroad receiving such property makes any use thereof, prior to its placement for installation or consumption, for any purpose other than to take custody thereof, make records thereof, sort, unpack or pack, break bulk, prepare, retain, handle or distribute the same and all detention and handling thereof at all times is on railroad operating property and at railroad operating expense.

35. All tangible personal property purchased as aforesaid is handled inbound, from the time the same reaches the [fol. 157] rails of the plaintiff, as company materials, on company material waybills and on free billing; and all of such property when received by plaintiff as purchaser and thereafter handled by the plaintiff in distribution over its lines of railroad, is likewise handled on free company billing, and the cost of all of such transportation over company rails is a charge to railway operating expense.

36. At the time of the order and shipment of all tangible personal property involved in this action from the interstate points of origin, plaintiff gave shipping directions specifying destination for the property either at plaintiff's points of installation, or at points of use such as terminals, shops, stations, or office buildings, or at points of distri-

bution such as material yards, roundhouses, stations or storehouses. Plaintiff maintains storehouses and storerooms and material yards and other places of storage along all of its lines of railroad at principal terminals, at division points or at stations. Such places for the holding and detention of railway materials and supplies are all a part of a unified distribution system.

Installation of Specific Order Materials, etc.

37. Specific order materials, supplies, etc., are purchased and handled in the following manner:

In order to perform deferred maintenance, to replace parts of main line track which had or was about to reach the end of its service life and in order to make provision for the safe operation of high speed trains, of which the new streamliner passenger trains are an illustration, plaintiff, in the year 1936, commenced the reconstruction of certain parts of its main lines of railroad. The materials described [fol. 158] in Exhibit "A" of the bill of complaint are materials which were purchased for the purpose of carrying out plaintiff's track renewal program in the year 1936. The necessity for such renewal program was ascertained prior to the year 1936 by inspection of the track, by experience in the life service of rail and ties and other materials in the railroad track which are subject to wear, and by reason of the determination to improve train schedules and to place in service certain passenger trains known as the streamliner trains to be operated on faster train schedules.

In accordance with the information so ascertained and the necessity for making such track renewals, the management of the railroad caused an investigation to be made concerning all the necessary track renewals and improvements in roadway for the purposes aforesaid, the necessity for the elimination and improvement of curvature, improvement of grades, the character and specification of the materials required, and required to be made an estimate of the cost of carrying out such program. The information prepared for the carrying out of such program included specific data, including the number of miles of new rail to be laid, the number of ties, frogs, switch points, bridge timbers or other bridge materials, spikes, bolts, nuts, tie plates, and an itemization of other materials which would be required,

such information constituting a complete specification of the work, to be performed.

Upon receipt of such data, the Department of Maintenance of Way and Purchasing Departments were called upon to estimate the cost of such proposed renewals and the resulting information and estimates, together with the basic data and specific recommendations of the local officials, including the General Manager, were then submitted to the President of plaintiff's railroad, who in turn submitted the [fol. 159] entire proposal to plaintiff's Board of Directors. The Board of Directors approved said program, and in order to carry it into fulfillment the purchasing agent of said railroad was required to secure bids for the purchase of said materials. Upon receiving satisfactory bids, orders were placed for the purchase of said materials at points outside the State of California. The greater part of such materials was manufactured for the express purpose of filling plaintiff's orders therefor and when ready for delivery by the sellers thereof to plaintiff, instructions were given for the transportation of said materials to points on plaintiff's railroad and over plaintiff's line of railroad to the several places of installation of said materials. Having information as to the dates of shipments and dates of expected arrival of said materials at such places of installation, gangs of workmen, known as "extra gangs" were assigned to the several points of installation in order that the materials would be installed in the railroad track with the utmost economy and dispatch. Said materials, including rails and ties, arrived at points of installation in carload lots and were unloaded from the cars upon the ground along the right of way at points of use and were installed by said extra gangs, all in accordance with the program theretofore made and outlined. The foregoing applies to the tangible personal property specifically described and set forth in Exhibit "A" of the bill of complaint.

As to similar property purchased by plaintiff, since the filing of said complaint and which will hereafter be purchased for use in California, to carry out track renewal programs, the procedure followed by plaintiff has been and will be substantially as follows:

In the fall of each year it is the custom and practice of plaintiff to follow the same procedure as above outlined with [fol. 160] regard to any substantial renewal or betterment

of its existing facilities. This annual renewal program is based upon estimates and recommendations of local officials and is included in the proposed budget which, if approved by the board of directors, follows the procedure above outlined with regard to the purchase and transportation into California and the installation of materials in California necessary to carry out the annual renewal program approved and authorized by plaintiff's board of directors.

All substantial repairs or renewals of railroad track, equipment, and the more important structures of the plaintiff's railroad transportation plant, insofar as the same deal with the purchase, transportation into the State of California, and installation of tangible personal property as a part of plaintiff's railroad facilities, are planned, programmed, authorized and completed in accordance with the hereinbefore described practice.

38. The track materials aforesaid were held or retained by plaintiff after the termination of their shipment to California by such delivery to the place of installation and before their installation in plaintiff's railroad for varying periods of time, the extent of such periods depending upon plaintiff's convenience, the stage of preparation for the installation thereof at the time of the arrival thereof at the point of distribution or installation, or other circumstances incidental to plaintiff's operations. The period of time between the termination of the shipments to California and the installation of the materials was no longer than was required for the convenient and effective installation thereof. The unloading, handling, retention and installation of such track materials were accomplished by railway employees and such installation, when accomplished, constituted a renewal or replacement of a part of the existing [fol. 161] railway operating plant and became immediately a part thereof.

39. Materials for replacement or renewals of major structures such as buildings and bridges were and are handled in the same manner as above related, excepting articles required in less than carload lots, which are usually handled in the same manner as materials and supplies for current operations and maintenance.

40. Materials and supplies, equipment, tools or parts which are ordered to fill special requirements are delivered

directly to the department making advance requisition therefor, and are not detained or held in any manner except such as is incidental to transportation to the place of installation or that which is incidental to such installation.

Stand-By Facilities, etc.

41. In the interest of prompt and efficient public service and in the performance and discharge of its obligations to the public as a common carrier by railroad, plaintiff is required and compelled to have supplies and facilities to meet current requirements distributed over its entire line of railroad in quantities and at the times necessary to anticipate regular current requirements, and to have such reserves in quantities necessary to meet constantly fluctuating demands and emergencies which result from changes in the volume of business handled, traffic accidents, wrecks, weather conditions, washouts, and unforeseen operating conditions which commonly affect a railroad, and to meet the ordinary wear and tear which occur in connection with the use of its railroad and facilities.

[fol. 162] Receipt, Distribution and Maintenance of Stand-By Materials

42. After the termination of the interstate shipment of stand-by materials and facilities, and upon their arrival at their places of destination on plaintiff's lines, the same are unloaded by plaintiff's employes directly to material yards, storehouses, shops, or other places maintained by the plaintiff as a part of its operating facilities for the detention of stand-by materials and supplies and plaintiff retains and holds them at such places as stated in the next paragraph.

43. Plaintiff retains and holds and keeps on hand in space provided by it in the State of California at strategic points along its lines of railroad—i.e., at points suitable for prompt distribution of stand-by facilities and materials as needed—over its entire system of lines.

44. The distribution by plaintiff of stand-by materials and facilities to stores located at the points along its lines of railroad aforesaid and the holding of such stand-by facilities at such places is necessary to insure the rendition by plaintiff as economically, efficiently and as free from interruption as possible of its interstate and intrastate railway transportation services.

Installation of Stand-By Facilities

45. When repairs become necessary to any part of plaintiff's railroad transportation plant or to any of the equipment or facilities thereof, plaintiff's employes who are charged with making such repairs take out or secure delivery to them from plaintiff's nearest place of detention thereof, such stand-by materials or facilities as are necessary to make such repairs.

When materials and supplies for current renewals, repairs or consumption are received at general stores in car-[fol. 163] load lots and such carload quantities are required at other points of use along the railroad, some part of such materials may be immediately reconsigned to such points of ultimate use, it being the practice of the plaintiff to distribute, as far as is practicable to do so, stand-by materials, supplies and facilities to most convenient points of distribution and as nearly as possible to the places of ultimate use thereof.

46. Between the time when stand-by facilities or stand-by renewal parts or materials are taken from plaintiff's stores or material yards, as above described, and the time when such articles are available as physically connected parts of plaintiff's railway transportation plant or of the equipment or facilities thereof, for carrying on interstate and intrastate transportation, time intervals occur during which such articles of property are retained or held in the possession of the plaintiff and are not in motion in the course of installation thereof, such time intervals being such as necessarily occur in the transportation thereof to the places of installation and such as occur when such articles or parts are set down at the places where they are to be physically connected with plaintiff's railway plant or facilities or equipment thereof, and before further movement or handling thereof in the course of actual installation can proceed. After such articles are taken from plaintiff's stores or material yards or other places of detention as above described, there is no retention or holding of any of said facilities, except such as necessarily occurs in the ordinary and efficient course of transporting said facilities to their ultimate destination and installing them as physically connected parts of plaintiff's railway transportation plant or the facilities or equipment thereof.

47. There is no holding in any warehouse, storeroom or [fol. 164] other like place of deposit, of any of the specific order property for renewals or replacements hereinbefore described, after the termination of the interstate shipment and the plaintiff's receipt thereof; however, time intervals during which such tangible personal property is retained or held in the possession of the plaintiff, and is not in motion in the course of installation thereof, occur between the time of termination of the interstate shipment thereof and the time when the installation of such tangible personal property is completed and the same is available as a physically connected part of plaintiff's railroad transportation plant for carrying foreign, interstate and intrastate transportation and commerce; said intervals being such as occur when such repairs or renewal parts are set down at the places where renewals or replacements are to be made and before further movement or handling thereof in the course of installation can proceed. There is no retention or holding of any said equipment except such as necessarily occurs in the ordinary and efficient course of transporting such tangible personal property to its ultimate destination and installing it as physically connected parts of plaintiff's railroad transportation plant.

48. At no time is the property herein referred to a part of a commercial stock in trade which is offered for sale or sold to the general public and plaintiff does not engage in the business of retailing any of the kinds of railway materials and supplies involved in this action and no part thereof is or was purchased or held for any purpose or purposes other than those herein described.

49. When stand-by facilities, materials and supplies are received, plaintiff's accounting department, pursuant to said accounting rules and regulations and uniform system [fol. 165] of accounts for railroad common carriers charges the cost thereof to its "materials and supplies" account. Upon taking such supplies from its railway stores or other places of detention for installation as a part of plaintiff's plant, facilities or equipment or for consumption in railway operation, plaintiff credits the cost thereof to its said "materials and supplies" account and charges them to the appropriate account for railway operation or for maintenance of roadway or equipment or other maintenance, or

to the appropriate property account, in accordance with the prescribed uniform system of accounts aforesaid.

The cost of handling and the cost of installation of all repair or renewal parts and the cost of handling of all of that class of materials which are consumed in operation are chargeable to operating expense or to operating property accounts and payable out of money devoted to transportation service. Such accounting is applicable to specific order materials and supplies as well as to stand-by materials and supplies.

50. The plaintiff did not change or alter the aforesaid purposes and uses of the tangible personal property involved in this action or its said intentions with regard thereto or divert any of said property to any other uses or purposes, and did not charge the cost of any part thereof to any business or enterprise other than its railroad transportation business, at the time of the incidence of said tax according to the terms of the statute, or at any time material to the issues here involved, except as hereinafter stated.

51. Notwithstanding any statement hereinbefore made relating to the manner of purchase and use of materials for car repairs and car maintenance, some part of plaintiff's purchases in interstate commerce of materials for [fol. 166] car repairs and car maintenance include materials which are used in the following circumstances.

It is the duty of common carriers by railroad to furnish cars for all classes of transportation which they undertake to perform and to provide cars for transportation throughout the United States by interchange with other lines of railroad. The interchange of cars between all lines of railroad is a part of transportation and such cars are inseparably used in both intrastate and interstate transportation. Common carriers by railroad are required by law to permit their freight cars to be interchanged to the rails of all connecting carriers. When cars of one line are on the tracks of another railroad, they are known as "foreign cars". When foreign railway cars are used by the plaintiff, they are hired or rented for such use and a compensation or rental is paid therefor by the plaintiff, while in operation on its line, and the cars so hired are used by the plaintiff as its own when so used. It is the duty of the plaintiff using cars so hired by it, both because of a contracted obligation and because of the unavoidable necessity of keeping cars in safe operating condition, to perform all necessary maintenance and

running repairs required by such cars. The contract to perform maintenance and running repairs for cars so rented and used by operating carriers is expressed in the code of rules governing the condition and repair to freight and passenger cars for the interchange of traffic, adopted by the Association of American Railroads, which rules are subscribed to by all railroad lines interchanging cars. Rule I of this code provides that the railroad is responsible for the condition of all cars on its line, and must give to all, regardless of responsibility, equal care as to inspection, oiling, packing and running repairs.

[fol. 167] All carriers using foreign cars pay to the car-owner per diem charges which are for reimbursement for interest on the investment, depreciation and cost of necessary repairs. When repairs are made to foreign cars by the operating railroad, the charge against the owner for reimbursement of the expense is an offset to the repair factor included in the basis for the per diem charge under which the owner assumes the expense of maintenance.

Cars, whether loaded or empty, having defects in violation of the Safety Appliance Acts, or the regulations of the Interstate Commerce Commission, may not be offered in interchange and cars in an unsafe condition or unsuitable for loading must be repaired on the line where such condition develops or is found to exist. The necessity for running repairs or for repairs necessary to enable the use of the car and its return to owning line, may result from normal wear or the completion of service life of a part which matures while the car is in possession of the operating carrier, or may result from accidental breakage or negligent handling of the car by the carriers making use thereof. In some cases, breakage or damage to the car may be due to a fault of the operating carrier, in which case the cost of repair is an expense properly chargeable to and borne by the operating carrier. The operating carrier making ordinary running repairs, or repairs necessary to enable the car to be safely operated, where damage to the car is not the result of the operating carrier's negligence, bills the owner of the car for actual cost of repairs and is reimbursed for such cost by the owner of the car. The obligation to make such repairs to foreign line cars while in plaintiff's possession is imposed upon plaintiff by the requirements of the Federal Safety Appliance Acts, the rules and [fol. 168] regulations of the Interstate Commerce Commission, the general interchange agreement of the Association

of American Railroads and plaintiff's legal duty to the shipping public to function efficiently as a common carrier.

Materials and supplies for foreign car repairs are purchased, accounted for and used in the same manner as like materials purchased for the repair of plaintiff's cars, and railroad operating capital is likewise used for the purchase of such materials, subject to reimbursement by the owner of the car for those repairs chargeable to the owner and not borne by the operating line. Foreign cars are used by the plaintiff for its purposes in inseparably carrying on intrastate, interstate and foreign commerce in the same manner as its own cars are used, and plaintiff's cars are subject to interchange with all foreign railroads in the same manner as foreign cars are interchanged to plaintiff's line.

52. Exclusive of the purchases of tangible personal property made by plaintiff for its own uses and in addition to the quantities hereinbefore described, upon which defendants claim the right to levy the tax in question, certain purchases of tangible personal property are made by or for plaintiff's subsidiary railroad companies in the following circumstances:

The Northwestern Pacific Railroad Company and the San Diego & Arizona Eastern Railway Company are wholly owned subsidiaries of Southern Pacific Company and, while nominally separate organizations, they are in many respects subject to the common management and control of Southern Pacific Company. Some of the officers and directors are common to all three of said companies. Said subsidiary companies cooperate closely with the parent company in furtherance of the parent company's transportation busi- [fol. 169] ness.

Each of these companies is a railroad engaged in the handling inseparably of intrastate, interstate and foreign transportation and commerce, and each of these railroads interchanges all classes of commerce with the Southern Pacific Company. Each of said railroads serves as a feeder line to and from plaintiff's lines of railroad. Each of these railroads reaches ports and points of interchange with carriers handling interstate and foreign commerce. Each of these railroads operates in the performance of transportation services in the same manner as plaintiff's operations are described in this stipulation, excepting as to the physical and geographical location of the lines of railroad.

Each of said lines of railroad has its own separate store

department and places of storage and means of distribution of materials and supplies on its own lines, and handles and distributes all tangible personal property used by it in the performance of transportation on its own lines.

The several methods of purchasing tangible personal property for said subsidiary companies are described as follows:

(a) The purchasing agent of each company makes certain purchases respectively in the name of said company, and all such purchases are delivered directly to said company at places on its lines and do not come into the possession of the plaintiff excepting as plaintiff may handle the same as a carrier in the process of transportation and delivery to said company as consignee. The purchases so made do not include any property which is not purchased in carload quantities. Taxes on account of the storage, use or other consumption of the materials described in this paragraph by said subsidiary lines are not sought to be enjoined in this proceeding.

[fol. 170] (b) In addition to property purchased in the manner above described, Southern Pacific Company purchases in its own name for its said subsidiary lines, certain materials to be used respectively by its subsidiary lines, which are purchased in carload lots and delivered respectively to said subsidiary lines in carload lots and said materials do not go into the possession of Southern Pacific Company for any purpose excepting as same may be handled by Southern Pacific Company as carrier thereof in the process of transportation and delivery of the same respectively to said subsidiary lines. Such purchases are originally made by the use of railway operating capital of Southern Pacific Company, which operating capital is reimbursed out of railway operating capital of the subsidiary company for which such purchases are made, and no part of such expenses or cost of such materials and supplies is ever charged to any other industry, business or activity of the plaintiff or of either of said subsidiary companies. Taxes on account of the storage, use or other consumption of the materials described in this paragraph by said subsidiary lines are not sought to be enjoined in this proceeding.

(c) In addition to tangible personal property purchased for said subsidiary companies in the manner hereinbefore described, Southern Pacific Company purchases in interstate commerce certain materials and supplies (hereinafter

specified) in limited quantities or in less than carload lots. Such purchases are made in the name of Southern Pacific Company for use by said subsidiaries respectively and are made in the same manner as Southern Pacific Company makes purchases for its own use and Southern Pacific Company is reimbursed for the full cost of making such purchases and handling and delivering the same to said subsidiary companies. Such purchases are originally made by [fol. 171] the use of railway operating capital of Southern Pacific Company, which railway operating capital is reimbursed out of railway operating capital of the subsidiary company for which such purchases are made and no part of such expense or the cost of said materials and supplies is ever charged to any other industry, business or activity of the plaintiff or of either of said subsidiary companies.

The following are all of the items which are specified in the bill of complaint and Exhibit "B" and which are purchased in the manner described in this part (c) above, to-wit:

Air brake parts, steel blooms, bolts and nuts, stay bolts, journal boxes, burners and lamps, car heating parts, car lighting parts, carbide, miscellaneous castings, steel chain, wire cloth, conduit, sheet copper, bell cord, cotters, couplers, seat coverings, retard devices, steel trap doors, electrical parts, feed water heater parts, copper flue ferrules, miscellaneous forgings, plug fuses, gaskets, McBeth glass, dust guards, headlight parts, air brake hose, steam hose, injector parts, boiler insulation, bar iron, flyer iron, stay bolt iron, McLaughlin joints, tail lamps, sash locks, lubricator parts, knuckles, common wire nails, metallic packing, priming paint, pantosote, sheathing paper, taper pins, plates and sheets, porous plugs, bull rings, brass rods, train battery separators, sheet steel, asbestos tape, torches, copper tubing, steel tubing, gate valves, globe valves, pressure valves, lock washers, wrot washers, graphite, driving journal grease, valve oil, colored cotton waste, journal box waste, terminal blocks, dry and condulet cells, channel pins, fibre end posts, battery renewals, copper wire, galvanized wire, iron wire, axes, hack saw blades, chisels, twist drills, files, wheel and coupler gauges, light globe guards, hammers, air tool hose, journal jacks, reamers, riveting hammer parts, saws, tube expanders, tool steel, taps, grinding wheels, wrenches, track [fol. 172] drill bits, track chisels, shank drills, ballast forks, track jacks, motor car parts, track picks, cross cut saws, track shovels, spark plugs, measuring tape, car cleaning

brushes, bunting, signal lamp burners, brake clubs, bell cord, crayons, fuses and torpedoes, lantern globes, mop heads, water hose, inspectors lanterns, sponges, baggage truck wheels, burlap, brass wire cloth, iron wire cloth, steel cloth, water hose, piling, black iron pipe, pipe fittings, galvanized iron pipe, round point shovels, stringers, washers.

Typical of such items of materials and supplies which are purchased in the name of Southern Pacific Company, for use by said subsidiaries as a purchasing agency respectively for said subsidiary companies, in the manner last described, is air brake hose. Air brake hose is put up in bundles or bales. Estimates for requirements of air brake hose for all three of said companies are respectively made by each of said companies and the estimated requirements for each three months' period are given to the purchasing agent of Southern Pacific Company. Said purchasing agent places the order therefor, purchases being made on single orders and usually for carload quantities. Shipments of such material are made to the store department of Southern Pacific Company and the required number of bundles or bales ordered for Southern Pacific Company is disposed of and handled in the manner hereinbefore described for the handling of Southern Pacific Company's materials and supplies. The remaining number of bundles or bales of air brake hose purchased for each of said subsidiary companies is held by said store department for such time as may be incidental to the reloading and transportation thereof to said subsidiary company. When said air brake hose is transported and delivered to either of said subsidiary companies, it is used in the operation of said railroad as a com- [fol. 173] mon carrier of intrastate, interstate and foreign commerce.

For accounting purposes, transfer requisitions are made to cover all such materials purchased for subsidiary companies and charges are made against said subsidiary companies for reimbursement of such cost of materials and purchasing expense. The procedure followed with respect to the handling of air brake hose, as above described, is followed in the handling of all of the tangible personal property hereinbefore itemized. All of said items so purchased for said subsidiary companies are purchased for use in and are actually used in conducting the transportation business of said subsidiary railroad companies in inseparably intermingled intrastate, interstate and foreign commerce.

Only that part of said items which are purchased by Southern Pacific Company for its own separate uses are included in the property on account of which defendants' claim use taxes as aforesaid. Taxes on account of the storage, use or other consumption of the materials described in this paragraph by said subsidiary lines are not sought to be enjoined in this proceeding.

53. As an exception to the facts hereinbefore stated, ties out of plaintiff's reserve or stand-by supply of ties, have been sold to Western Pacific Railroad Company in the following circumstances: on occasions when said railroad company has been in urgent need of a small supply of ties and has requested the same of plaintiff, plaintiff has sold to Western Pacific Railroad Company, such small amount of ties as would not materially diminish its reserve supply thereof. Such sales have not at any time amounted to in excess of one-tenth of one per cent of plaintiff's regular reserve supply of ties. Upon such a sale being made, a sufficient quantity of ties is included in plaintiff's next purchase of ties to make up such depletion of its reserve [fol. 174] supply. An accommodation of this character is only made in some exceptional emergency and such sales are of extremely rare occurrence. Similar sales of some other material or repair part may have been made to some railroad company other than plaintiff's subsidiary railroads in some exceptional emergency.

54. By reason of its inextricably intermingled interstate, foreign and intrastate commerce and business, plaintiff is compelled to purchase from points outside of California and to use and consume a greater amount of tangible personal property than it would be required to purchase if it were engaged only in intrastate railroad transportation business.

55. Notwithstanding that none of the property aforesaid was, is or will be used exclusively and separately by the plaintiff in conducting intrastate transportation business, but that all of it is used as hereinbefore stated, defendants have demanded of the plaintiff the taxes aforesaid under the provisions of Ruling No. 11 of the defendant, said State Board of Equalization, promulgated on or about February 6, 1936, which said ruling is as follows:

"The fact that tangible personal property is purchased in interstate or foreign commerce does not exempt from the tax the storage, use or other consumption of such property

in this State after the shipment of the property in interstate or foreign commerce has ended.

"The fact that tangible personal property issued in this state in interstate or foreign commerce following its storage in this State does not exempt the storage of the property from the tax. The tax does not apply to the use or storage of property purchased for use in interstate or foreign commerce and actually placed in use in interstate or foreign commerce prior to its entry into this State."

[fol. 175] Conclusions of Law

(1) The court has jurisdiction of all of the parties hereto and of the subject-matter of this action.

(2) This suit arises under the Constitution of the United States.

(3) The imposition of the California Use Tax upon the acts and transactions found in the foregoing findings of fact to have occurred with respect to the tangible personal property described in said findings of fact, after the termination of the interstate transportation thereof, would not be a direct burden upon the interstate commerce and business of the plaintiff and would not be contrary to or in violation of the provisions of Clause 3 of Section 8 of Article I of the Constitution of the United States and the rights, privileges and immunities of the plaintiff thereunder.

(4) By reason of the facts and circumstances hereinbefore found and concluded plaintiff's application for a permanent injunction should be denied and the bill of complaint on file herein should be dismissed.

Let the Decree be entered accordingly.

William Denman (United States Circuit Judge).
Michael J. Roche (United States District Judge).
—— —— (United States District Judge).

Plaintiff acknowledges due and timely service of the foregoing proposed findings of fact and conclusions of law, this 14th day of May, 1938.

Harry H. McElroy, Attorney for Plaintiff.

Approved as to form as provided by Rule 22.

Harry H. McElroy, —— ——, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 176] IN UNITED STATES DISTRICT COURT

[Title omitted]

OBJECTIONS TO CONCLUSIONS OF LAW PROPOSED BY DEFENDANTS, AND CONCLUSIONS OF LAW PROPOSED BY PLAINTIFF

Now comes the plaintiff above named and objects to the Conclusions of Law proposed by the defendants herein and [fol. 177] lodged with the Clerk of this Court, and to each one thereof, on the grounds that said proposed Conclusions of Law are insufficient, incomplete and incorrect, in the respects in which they differ from plaintiff's proposed conclusions of law, and deny to plaintiff the relief to which it is lawfully and equitably entitled under the Court's findings of fact, and if said defendants' proposed Conclusions of Law or any of them are adopted by the Court, plaintiff asks for an exception to each and all of said defendants' proposed Conclusions of Law as may be thus adopted.

Plaintiff herewith submits to the Court its proposed Conclusions of Law, which plaintiff respectfully represents to be sufficient and correct and which are justified by the Court's Findings of Fact, and moves the adoption thereof, each and separately, and asks to be allowed an exception to the denial thereof and to the denial of each one thereof, if the Court refuses to adopt the same or either thereof:

Conclusions of Law Proposed by Plaintiff

The Court having made and filed its Findings of Fact herein, now makes the following conclusions of law thereon:

1. The Court has personal jurisdiction of each of the defendants herein, and has jurisdiction of the subject matter of this action because of diversity of citizenship, inasmuch as the action is between citizens of different states, and the amount involved exceeds the sum of $3,000, exclusive of interest and costs. The Court further concludes that jurisdiction arises from the fact that this action involves a controversy arising under the Constitution of the United States.

2. The Court concludes as a matter of law, based upon the admitted allegations of the bill of complaint and the findings of fact heretofore made and filed herein, that plaintiff is without a plain, speedy and adequate remedy at law in

[fol. 178] the premises, and that plaintiff is therefore entitled to relief in equity in this Court.

3. The Court concludes as a matter of law that all purchases of tangible personal property involved in this action were made and paid for by funds classified as railway operating capital and that the property purchased with such capital is subject to classification and is classified as railway operating property from and after the time of its purchase.

4. The Court concludes as a matter of law that all of the tangible personal property involved in this action was purchased for the sole, fixed and predetermined purposes of using the same for carrying on plaintiff's intermixed and inseparable intrastate, interstate and foreign transportation business and that said property was devoted to the service of transportation and use in carrying on said business from the time of its purchase.

5. The Court concludes as a matter of law that any and all storage of the tangible personal property involved in this action made by the plaintiff within the State of California was not a storage separate or separable from and antecedent to plaintiff's use in carrying on its intermingled and inseparable intrastate, interstate and foreign transportation business, but was an inseparable part of use in carrying on such business.

6. The Court concludes as a matter of law that the tangible personal property purchased for and devoted to plaintiff's use as materials and supplies for the current operation, repair and renewal of its existing railway transportation plant was for an integral use in plaintiff's interstate commerce operations and at all times from and after the date of purchase and transportation into the State of California, the storage, use or other consumption of said property by plaintiff constituted a use in interstate commerce.

7. The Court concludes as a matter of law that the tan-
[fol. 179] gible personal property purchased for and devoted to an existing renewal and maintenance program was for an integral use in plaintiff's interstate commerce operations and at all times from and after the date of purchase

and transportation into the State of California, the storage, use or other consumption of such property by plaintiff constituted a use in interstate commerce.

8. The Court concludes as a matter of law that the plaintiff has established that the storage of the tangible personal property involved in this action, solely for its current repairs and renewals and necessary extensions of its intermingled interstate and intrastate enterprise and plant, and without which usage the railways would stop running, is a use in interstate commerce.

9. The Court concludes as a matter of law that the tax proposed to be assessed upon such use is a tax directly upon an interstate commerce use—that is, a tax upon interstate as distinguished from any intrastate function performed by the railway as a public carrier.

10. The Court concludes as a matter of law that the imposition of the said use tax upon storage within California would impose a tax which would be extra-territorial in its operation and would reach to and impose a direct tax and a direct burden upon ultimate uses and consumption in other states of the property so stored or of an inseparable part thereof.

11. The Court concludes as a matter of law that the use taxes sought to be imposed upon plaintiff by the defendants under the said Use Tax Act of 1935 on account of the storage, use or other consumption of the tangible personal property in question, were and are direct taxes upon operative instrumentalities of interstate commerce, a direct burden of expense chargeable to such commerce, and an unconstitutional burden on interstate transportation and interstate commerce, contrary to and in violation of the pro- [fol. 180] visions of Article I, Section 8, Clause 3 of the Constitution of the United States.

12. The Use Tax Act of 1935, if construed and applied by defendants so as to impose a tax on the acts or transactions, or any of them, found in the foregoing Findings of Fact to have occurred with respect to the tangible personal property described in said Findings of Fact, after the termination of the interstate transportation thereof, is contrary to and in violation of the provisions of Article I, Section 8, Clause

3, of the Constitution of the United States, and the rights, privileges and immunities of the plaintiff thereunder.

13. The Court concludes as a matter of law that the defendants may not constitutionally enforce the provisions of the California Use Tax Act against the plaintiff upon the tangible personal property set forth in the complaint and described in the Findings of Fact, or any like or similar property, and that plaintiff is entitled to a permanent injunction.

—— ——, United States Circuit Judge. —— ——, United States District Judge. —— ——, United States District Judge.

Respectfully submitted, Harry H. McElroy, Attorney for Plaintiff.

Dated May 26, 1938.

Service of copy of the foregoing Conclusions of Law requested by plaintiff is admitted this 26 day of May, 1938.
U. S. Webb, by J. J. Arditto, Attorney for Defendants.

Approved as to Form as Provided in Rule 22.
U. S. Webb, by J. J. Arditto, Attorney for Defendants.

Lodged: May 26, 1938.

[fol. 181] In United States District Court, Northern District of California, Southern Division

Equity No. 4055-R

Southern Pacific Company, a Corporation, Plaintiff,

vs.

John C. Corbett et al., Defendants

Final Decree—Filed June 14, 1938

This Cause came on to be heard on the 28th day of December, 1937, and was argued by Harry H. McElroy and Guy V. Shoup, Esqs., attorneys for the plaintiff, and Honor-

able U. S. Webb, Attorney General of the State of California [fol. 182] by H. H. Linney and James J. Arditto, Deputies Attorney General, and thereupon on consideration thereof, it is Ordered, Adjudged and Decreed as follows: to-wit:

That plaintiff's application for a permanent injunction be denied, and the plaintiff's bill of complaint be dismissed.

It is Further Ordered, Adjudged and Decreed that the defendants recover their costs herein expended.

Dated this 14th day of June, 1938.

William Denman. United States Circuit Judge.
Michael J. Roche, United States District Judge.
—— ——, United States District Judge.

Approved as to form, June 4th, 1938.

Guy V. Shoup, Harry H. McElroy, Attorneys for Plaintiff.

Receipt of a copy of the within is admitted this 4th day of June, 1938.

By Harry H. McElroy, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 183] In United States District Court

[Title omitted]

Petition for Appeal, Assignment of Errors and Prayer for Reversal—Filed June 21, 1938

Petition for Appeal

Considering itself aggrieved by the final judgment and decree of the District Court of the United States, in and [fol. 184] for the Northern District of California, Southern Division, specially constituted under Section 266 of the Judicial Code, in the above-entitled case, the plaintiff in said case, Southern Pacific Company, hereby prays that an appeal from said judgment and the whole thereof be allowed to the Supreme Court of the United States, and for an order fixing the amount of the bond thereon.

Assignment of Errors

And the said plaintiff, (appellant on the appeal) assigns the following errors in the record and proceedings in the said cause:

The District Court of the United States, in and for the Northern District of California, Southern Division, erred in its opinion and decision in said cause in the following particulars:

1. The Court erred in making the conclusion of law that the imposition of the California use tax upon the acts and transactions found in the findings of fact to have occurred with respect to the tangible personal property described in said findings of fact, after the termination of the interstate transportation thereof, would not be a direct burden upon the interstate commerce and business of the plaintiff and would not be contrary to or in violation of the provisions of Clause 3 of Section 8 of Article I of the Constitution of the United States and the rights, privileges and immunities of the plaintiff thereunder.

2. The Court erred in making the conclusion of law that by reason of the facts and circumstances found and concluded, plaintiff's application for a permanent injunction should be denied and the bill of complaint on file herein should be dismissed.

3. The Court erred in refusing to make the conclusion of law requested by the plaintiff that all purchases of tangible personal property involved in this action were made and paid for by funds classified as railway operating capital [fol. 185] and that the property purchased with such capital was subject to classification and was classified as railway operating property from and after the time of its purchase.

4. The Court erred in refusing to make the conclusion of law requested by the plaintiff that all of the tangible personal property involved in this action was purchased for the sole, fixed and predetermined purposes of using the same for carrying on plaintiff's intermixed and inseparable intrastate, interstate and foreign transportation business and that said property was devoted to the service of transportation and use in carrying on said business from the time of its purchase.

5. The Court errred in refusing to make the conclusion of law requested by the plaintiff that any and all storage of the tangible personal property involved in this action made by the plaintiff within the State of California was not a storage separate or separable from and antecedent to plaintiff's use in carrying on its intermingled and inseparable intrastate, interstate and foreign transportation business, but was an inseparable part of use in carrying on such business.

6. The Court erred in refusing to make the conclusion of law requested by the plaintiff that the tangible personal property purchased for and devoted to plaintiff's use as materials and supplies for the current operation, repair and renewal of its existing railway transportation plant was for an integral use in plaintiff's interstate commerce operations and at all times from and after the date of purchase and transportation into the State of California, the storage, use or other consumption of said property by plaintiff constituted a use in interstate commerce.

7. The Court erred in refusing to make the conclusion of law requested by the plaintiff that the tangible personal property purchased for and devoted to an existing renewal and maintenance program was for an integral use in plain-
[fol. 186] tiff's interstate commerce operations and at all times from and after the date of purchase and transportation into the State of California, the storage, use or other consumption of such property by plaintiff constituted a use in interstate commerce.

8. The Court erred in refusing to make the conclusion of law, requested by the plaintiff, that the plaintiff had established that the storage of the tangible personal property involved in this action, solely for its current repairs and renewals and necessary extensions of its intermingled interstate and intrastate enterprise and plant, and without which usage the railways would stop running, was a use in interstate commerce.

9. The Court erred in refusing to make the conclusion of law, requested by the plaintiff, that the tax proposed to be assessed upon such use is a tax directly upon an interstate commerce use—that is, a tax upon an interstate as distinguished from any intrastate function performed by the railway as a public carrier.

10. The Court erred in refusing to make the conclusion of law, requested by the plaintiff, that the imposition of the said use tax upon storage within California would impose a tax which would be extra-territorial in its operation and would reach to and impose a direct tax and a direct burden upon ultimate uses and consumption in other states of the property so stored or of an inseparable part thereof.

11. The Court erred in refusing to make the conclusion of law, requested by the plaintiff, that the use taxes sought to be imposed upon plaintiff by the defendants under the said Use Tax Act of 1935 on account of the storage, use or other consumption of the tangible personal property in question, were and are direct taxes upon operative instrumentalities of interstate commerce, a direct burden of expense chargeable to such commerce, and an unconstitutional burden on interstate transportation and interstate com- [fol. 187] merce, contrary to and in violation of the provisions of Article I, Section 8, Clause 3 of the Constitution of the United States.

12. The Court erred in refusing to make the conclusion of law requested by the plaintiff that the said Use Tax Act of 1935, as construed and applied by defendants so as to impose a tax on the acts or transactions, or any of them, found in the Court's Findings of Fact to have occurred with respect to the tangible personal property described in said Findings of Fact, after the termination of the interstate transportation thereof, is contrary to and in violation of the provisions of Article I, Section 8, Clause 3 of the Constitution of the United States, and the rights, privileges and immunities of the plaintiff thereunder.

13. The Court erred in refusing to make the conclusion of law requested by the plaintiff that the defendants might not constitutionally enforce the provisions of the said California Use Tax Act against the plaintiff upon the tangible personal property set forth in the complaint and described in the Findings of Fact, or any like or similar property, and that plaintiff is entitled to a permanent injunction.

14. The Court erred in failing and refusing to make the conclusion of law based upon and justified by the Findings of Fact herein, that the imposition and collection of the said tax effectuates a taking of plaintiff's property without due

process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

15. The Court erred in deciding, adjudging and decreeing that plaintiff's application for a permanent injunction be denied.

16. The Court erred in deciding, adjudging and decreeing that plaintiff's bill of complaint be dismissed.

[fols. 188-229] Prayer for Reversal

For which errors, the said plaintiff, Southern Pacific Company, prays that said judgment and decree of the District Court of the United States, in and for the Northern District of California, Southern Division, in the above entitled cause, be reversed and that said Court be ordered to enter a decree in favor of said plaintiff as prayed for in plaintiff's bill of complaint, and that plaintiff be awarded its costs.

Harry H. McElroy, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 230] In United States District Court

[Title omitted]

Order Allowing Appeal—Filed June 21, 1938

The plaintiff in the above entitled suit having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment and decree [fols. 231-237] made and entered in the above entitled suit by the District Court of the United States, in and for the Northern District of California, Southern Division, on the 14th day of June, 1938, and from each and every part thereof, and having presented and filed its petition for appeal, assignments of errors, and prayer for reversal, pursuant to the statutes and rules of the Supreme Court of the United States, in such case made and provided.

It is Now Ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the District Court of the United States, in and for the Northern District of California, Southern Division, in this

cause, as provided by law, and it is further ordered that the Clerk of said District Court shall prepare and certify a transcript of the record, proceedings and judgment and decree in this cause, and forthwith transmit the same to the Supreme Court of the United States.

And it is Further Ordered that security for costs on appeal be fixed in the sum of $500.00 (Five Hundred Dollars).

William Denman, United States Circuit Judge.

[File endorsement omitted.]

[fol. 238] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO CONTENTS OF TRANSCRIPT OF RECORD, ETC.—Filed June 23, 1938

It is hereby stipulated that the transcript of record to be filed in the Supreme Court of the United States, pursuant [fol. 239] to the appeal heretofore allowed herein, shall include the following:

1. Bill of Complaint, including Exhibits thereto.
2. Stipulation dated April 29, 1937, relating to construction of complaint.
3. Motion for Restraining Order, etc.
4. Order Noticing Necessity for Other Judges, Issuing Temporary Restraining Order and Order to Show Cause, etc., dated July 10, 1936.
5. Proof of service of copy of bill of complaint, temporary restraining order and order to show cause, etc., on Hon. Frank F. Merriam, Governor of the State of California.
6. Motion to dismiss Bill of Complaint.
7. Opinion on Motion to Dismiss Bill of Complaint and Awarding Interlocutory Injunction.
8. Decree for Interlocutory Injunction, etc., dated November 16, 1937.
9. Answer to Bill of Complaint.
10. Stipulation of Facts.
11. Stipulation for Correction of Stipulation of Facts, dated December 27, 1937.
12. Opinion of the Court, filed May 3, 1938.

13. Findings of Fact and Conclusions of Law Proposed by Defendants, and Adopted by the Court.

14. Objections to Conclusions of Law Proposed by Defendants, and Conclusions of Law Proposed by Plaintiff.

15. Final Decree.

16. Petition for Appeal, Assignment of Errors and Prayer For Reversal.

17. Statement as to Jurisdiction.

18. Order Allowing Appeal.

19. Bond for Costs.

[fol. 240] 20. The Original of the Citation on Appeal and Acknowledgment of Service thereof.

21. Notice under Rule 12, paragraph 2, and Acknowledgment of Service of Appeal Papers.

22. Stipulation as to Contents of Transcript of Record, etc.

Inasmuch as the case was submitted on the complaint, answer and stipulation of facts, which are to be included in the transcript of record as herein stipulated, there is no narrative statement of evidence pursuant to Equity Rule 75.

It is agreed that the proof of service of the bill of complaint and notice of hearing upon the Attorney General of the state and the other defendants, the bonds for temporary restraining order, the bonds for interlocutory injunction, the stipulations and orders for substitution of defendants (being successive individual members of the State Board of Equalization of the State of California), the order of the Court restoring and continuing the interlocutory injunction pending appeal and the bond therefor, all heretofore filed herein, are not necessary to the consideration of the appeal and need not be included in the transcript of record.

Harry H. McElroy, Counsel for Plaintiff. U. S. Webb, Attorney General, H. H. Linney, Deputy Attorney General, by James J. Arditto, Deputy Attorney General, Counsel for Defendants.

[File endorsement omitted.]

[fol. 241] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 242-243] Citation, in usual form, showing service on U. S. Webb et al., filed June 23, 1938, omitted in printing.

[fol. 244] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed July 19, 1938

The appellant adopts its assignment of errors as its statement of the points to be relied upon in this Court.

The appellant designates the whole of the record, as filed, to be printed except as follows:

(a) Stipulation dated April 29, 1937, relating to construction of the complaint (p. 52 of the original certified transcript).

(b) Stipulation for correction of stipulation of facts dated December 27, 1937, (p. 128 transcript).

(c) Bond for costs (p. 232 transcript).

(d) Exhibit C of the bill of complaint (p. 51 transcript), the same being a copy of the California Use Tax Act of 1935, which is now officially published in Cal. Stats. 1935, p. 1297, ch. 361.

Harry H. McElroy, Counsel for Appellant.

[fol. 245] Undersigned counsel for all appellees hereby accept and acknowledge service of copy of the foregoing statement of points to be relied upon and designation of the parts of the record to be printed, and stipulate and agree that the parts of the record to be printed as therein shown are sufficient for consideration of the questions presented in the appeal of this case.

U. S. Webb, H. H. Linney, Counsel for Appellees.

[fol. 246] [File endorsement omitted.]

Endorsed on cover: File No. 42,697. N. California, D. C. U. S. Term No. 212. Southern Pacific Company, appellant, vs. John C. Corbett, Fred E. Stewart, Richard E. Collins, William G. Bonelli and Harry B. Riley, as Members of the State Board of Equalization of the State of California, et al. Filed July 19, 1938. Term No. 212, O. T., 1938.